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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 108.

THE MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MAY 25, 1901.

(18,181.)

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a Pleas and procee lings in the United States circuit court of appeals for the eighth circuit, at the May term, 1900, of said court, begun and held at the United States court-house in the city of St. Paul, Minnesota, on the first Monday in May, to wit: the seventh day of May, A. D. 1900, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twelfth day of January, A. D. 1898, a transcript of record, pursuant to an appeal allowed by the circuit court of the United States for the district of Kansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Missouri Pacific Railway Company was appellant, and The United States of America was appellee, which said transcript of record is in the words and figures following, to wit:

1 The United States of America to the United States of America:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, in the State of Missouri, sixty (60) days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the second division of the judicial district of Kansas, wherein The Missouri Pacific Railway Company is appellant and The United States of America is respondent, to show cause, if any there be, why the order and decree rendered against the said appellant in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

CASSIUS G. FOSTER, *Judge.*

We hereby this 23rd day of December, A. D. 1897, accept due personal service of this citation on behalf of The United States of America, appellee, and agree to enter the appearance of the United States of America in the said cause in the United States circuit court of appeals for the eighth circuit.

I. E. LAMBERT,
United States Attorney for the District of Kansas.
W. C. PERRY,
Solicitor for Appellee.

390. Citation. Filed Dec. 23, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

Bill of Complaint.

Comes now The United States of America by J. W. Ady, United States attorney for the district of Kansas, and brings this, its
2 bill of complaint, against The Missouri Pacific Railway Company, the defendant herein, and thereupon your orator complains and says:

That this action is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is given and made in pursuance of the request of the Interstate Commerce Commission of the United States, that the United States attorney for the district of Kansas be directed and authorized to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate-commerce law against the defendant in relation to the matters hereinafter complained of.

And your orator further avers and shows unto your honors that The Missouri Pacific Railway Co., defendant herein, is a corporation organized and existing under and by virtue of the laws of the States of Missouri and Kansas, and that said defendant was at all times hereinafter mentioned, and now is a common carrier of all classes and kinds of freight and commodities, which are commonly moved, carried and transported by railroad companies in the freight traffic of such companies, between the city of St. Louis, in the State of Missouri, and the city of Omaha, in the State of Nebraska, and the city of Wichita, in the State of Kansas, and between all points intermediate and beyond cities on the line of defendant's railroad, which said railroad and which said points of shipment are situated in various States of the United States.

And your orator further avers and shows unto your honors that all shipments of freight between the city of St. Louis and the city of Wichita, and all shipments of freight between the city of St. Louis and the city of Omaha, by said defendant company pass over the same track between the city of St. Louis and the city of Holden, in the State of Missouri, a distance of 232 miles. That from said last-named point said defendant has two lines of railroad, one of which runs in a northwesterly direction to the city of Omaha, in the State of Nebraska, a distance over said defendant's railroad of five hundred — one (501) miles from the city of St. Louis, and one branch of which railroad runs in a southwesterly direction to the city of Wichita, in the State of Kansas, a distance over defendant's railroad from said city of St. Louis of 458 miles. That said defendant owns, controls, manages and operates both of said

lines of railroad in connection with many other lines of railroad, owned, controlled, managed and operated by it and forming the Missouri Pacific system, and extending into and
3 through many States of the United States, and that said defendant is constantly engaged as a common carrier of freight and passengers in the interstate commerce between the several States of the United States, and that the freight traffic between the said city of St. Louis and the city of Wichita over said defendant's railroad is very extensive in volume, amounting to many thousand dollars per annum, and that said city of St. Louis is a general distributing point situated on the Mississippi river, and furnishes a market for large amounts of live stock, and for freight of all classifications, and that the city of Wichita is a general distributing point for central and southern Kansas and the Indian Territory and Oklahoma, and furnishes an extensive market for freight of all classifications, and has extensive stock yards and is largely engaged in the shipment of live stock, and, but for the acts complained of, would carry on a large and profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight. And that said defendant's railroad between said city of St. Louis and the city of Wichita with its western and southern connections with other railroads at the said city of Wichita constitutes one of the principal thoroughfares for the freight traffic between the Mississippi river and the Pacific ocean, and between the Mississippi river and the gulf of Mexico, at the city of Galveston.

And your orator further avers and shows unto your honors that said defendant has established, and for a long time has maintained in force, and still maintains in force on the line of its railroad between the city of St. Louis and the city of Wichita, aforesaid, rates, rules and regulations governing all freight traffic between said cities over the said railroad which are unjust and (*reasonable*) in this, that the charge for services rendered by said company in the transportation of property and freight of each and every classification between the said city of St. Louis and the city of Wichita is excessive and exorbitant to the great detriment and hindrance of commerce and trade between the cities and between said localities, and to the irreparable injury to the public and to the people of the United States.

And your orator further avers and shows unto your honors that said defendant has established and for a long time prior hereto has maintained in force, and still maintains in force upon its said railroad a tariff and schedule of freight rates, rules and regulations governing all freight traffic passing between the city of Omaha and the city of St. Louis, and all traffic passing between the city of Wichita and the city of St. Louis, by means of which said defend-
4 ant charges, demands, collects and receives a greater compensation for the transportation of property and freight of each and every classification over its railroad between the city of Wichita and the city of St. Louis than it does for the transportation of property and freight of the same kind and same classification between the city of Omaha and the city of St. Louis, notwithstanding the

fact that said shipments are made at the same time, and contemporaneously and under similar circumstances and conditions, and that the city of Omaha is a greater distance from St. Louis than the city of Wichita. That the tariff rates, rules and regulations in force on its railroad and the charges demanded and collected and received by defendant upon its railroad for shipments between the city of Wichita and the city of St. Louis are an unjust and unreasonable discrimination against persons shipping property between said city of Wichita and the city of St. Louis, and that said tariff rates, rules and regulations subject persons shipping between the city of Wichita and the city of St. Louis, and subject said localities, to an undue and unreasonable prejudice and disadvantage by reason of the fact that the charges made in pursuance of said tariff rates, rules and regulations are in excess of the charges made by said defendant for like and contemporaneous service for the transportation of property between the city of Omaha and the city of St. Louis under substantially similar circumstances and conditions and are unreasonable, excessive, exorbitant and unjust.

And your orator further avers and shows unto your honors that the tariff and schedule rate and charge for the shipment of cattle on foot between the city of Omaha and the city of St. Louis over defendant's railroad is 17½ cents per cwt. That the tariff and schedule rate and charge for the shipment of hogs on foot from the city of Omaha to the city of St. Louis over defendant's railroad is 20 cents per cwt. That the tariff and schedule rate and charge for the shipment of cattle on foot between the city of Wichita and the city of St. Louis over defendant's railroad is 28½ cents per cwt. That the tariff and schedule rate and charge for the shipment of hogs on foot between the city of Wichita and the city of St. Louis over defendant's railroad is 35 cents per cwt.

That the tariff and schedule rate and charge for the shipment of the various classifications of freight between the city of Omaha and the city of St. Louis over defendant's railroad is as follows, to wit:

First-class freight 55 cents per cwt.
Second-class freight 40 cents per cwt.
Third-class freight 32 cents per cwt.
Fourth-class freight 25 cents per cwt.
Fifth-class freight 20 cents per cwt.
Class A 22½ cents per cwt.
Class B 17½ cents per cwt.
Class C 15 cents per cwt.
Class D 12½ cents per cwt.
Class E 11 cents per cwt.

That the tariff and schedule rate and charge for shipment of the various classifications of freight between the city of Wichita and the city of St. Louis over defendant's railroad is as follows, to wit:

First-class freight 115 cents per cwt.
Second-class freight 93 cents per cwt.
Third-class freight 78 cents per cwt.
Fourth-class freight 62½ cents per cwt.
Fifth-class freight 53 cents per cwt.

Class A 52 cents per cwt.
Class B 39½ cents per cwt.
Class C 33 cents per cwt.
Class D 27 cents per cwt.
Class E 11 cents per cwt.

That said tariff and schedule rates and charges above set forth constitute in this an unjust and unreasonable discrimination against persons shipping freight between the city of Wichita and the city of St. Louis, and subject such persons and the localities from which they ship to an unjust and unreasonable prejudice and disadvantage to the great hindrance and detriment of trade and commerce between said localities and to the irreparable injury to the persons shipping from said points and to the people of the United States.

In consideration whereof and inasmuch as the wrongs herein complained of are remediless in the premises under the common law and are only reviewable in a court of equity and in this form of procedure your orator prays that the Missouri Pacific Railway Company, its officers, agents and employés may be provisionally and perpetually enjoined and restrained by order of injunction issued herein from further establishing and maintaining in force upon its road rates, rules and regulations and charges governing the freight traffic between the city of Wichita and the city of St. Louis by means whereof said defendant, its officers, agents and employés are required to and do collect a greater compensation for the shipment of live stock and for the shipment of any one of the various classifications of freight mentioned in the foregoing bill of complaint, between the city of Wichita and the city of St. Louis, than it at the same time charges and receives for shipment of live stock or freight of
6 either of the classifications named in the foregoing bill of complaint between the city of Omaha and the city of St. Louis, and that said defendant, its officers, agents and employés be required to establish, put into effect and maintain upon its said railroad the same or no greater rate and charge for transportation of freight of like classification between the city of Wichita and the city of St. Louis, than it puts into force and maintains between the city of St. Louis and the city of Omaha.

To the end therefore that said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to each and all the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph, and it was specially interrogated thereunto, may it please your honors to grant unto your orator a writ of *subpœna ad respond-um* issuing out of and under the seal of this honorable court, to be directed to said defendant, The Missouri Pacific Railway Company, commanding it on a certain day and under a certain penalty to be therein inserted, to appear before your honors in this honorable court and then and there full, true, direct and perfect answer make to all and singular the premises (answer under oath being hereby waived), and further to stand to, perform and

abide by such further order or decree as to your honors shall seem meet and just.

And also may it please your honors to grant to your orator a writ of provisional and a writ of perpetual injunction to the same tenor, purport and effect as hereinbefore set forth and prayed, and also that in the meantime said defendant may be temporarily restrained and enjoined by writ of preliminary injunction or rule issuing out of and under the seal of this honorable court, from doing any of the things against which an injunction is hereby prayed; and that your orator may have such other and further relief in the premises as the nature of the case may require and to your honors shall seem meet.

And your orator will ever pray, etc.

THE UNITED STATES OF AMERICA,
By J. W. ADY,
United States Attorney, Solicitor for Complainant.

J. E. HOWARD, *Of Counsel.*

UNITED STATES OF AMERICA, *District of Kansas,* } ss:

On this 25 day of July, 1893, before me personally appeared J. W. Ady, to me well known as such, and who being duly sworn
7 did depose and say that he was and is United States attorney for the district of Kansas; that he has read the foregoing bill of complaint and knows its contents, and that the matters and things therein contained are true as he verily believes.

J. W. ADY.

Subscribed and sworn to before me this 25 day of July, 1893.

JOSIAH FOLTZ,
Clerk Dist. Court,
[SEAL.] By ADDIE MEADE,
Deputy Clk.

Indorsed: 390. The United States of America *vs.* The Missouri Pacific Railway Company. Bill in chancery. Filed July 26, 1893. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States, District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

To the clerk of said court:

Please issue chancery subpœna directed to the defendant The Missouri Pacific Railway Company, commanding it on a certain day to appear and true and perfect answer make to all and singular the premises and to perform such order etc. required.

J. W. ADY, *U. S. Att'y.*
J. E. HOWARD, *Of Counsel.*

Indorsed: No. 390. U. S. of America *vs.* The Mo. Pac. Rwy. Co. Filed July 26th, 1893. Geo. F. Sharitt, clerk.

Chancery Subpœna.

UNITED STATES OF AMERICA, *District of Kansas, Second Division,* } ss:

The United States of America to the Missouri Pacific Railway Company, Greeting:

We command you and every one of you, that you appear before our judge of our circuit court of the United States of America for the district of Kansas, second division, at the city of Wichita on the first Monday in the month of September next, to answer the
8 bill of complaint of the United States of America this day filed in the clerk's office of said court, in said city of Wichita then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of Wichita, in said district, this 26th day of July, in the year of our Lord, one thousand eight hundred and ninety-three.

[SEAL.] GEO. F. SHARITT, *Clerk*,
By J. F. SHEARMAN, *Deputy*.

MEMORANDUM.—The above-named defendant is notified that unless it enter its appearance in the clerk's office of said court, at the city of Wichita aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against it as confessed, and a decree entered accordingly.

GEO. F. SHARITT, *Clerk*,
By J. F. SHEARMAN, *Deputy*.

Received this writ July 28th, 1893, and served the same on the within-named defendant The Missouri Pacific Railway Company, at Wichita, State and district of Kansas, July 28th, 1893, by delivering to G. H. Mann personally a true and certified copy of this writ with all the endorsements thereon, he the said G. H. Mann being then and there the freight agent for said defendant company, at its office and usual place of business in Wichita, Kansas.

I was unable to find any other officer of the Missouri Pacific Railway Company in my district.

R. L. WALKER,
U. S. Marshal,
By B. D. BEALL, *Deputy*.

One service $2.00.

Indorsed: No. 390. Circuit court United States, district of Kansas, second division. The United States of America *vs.* The Missouri

Pacific Railway Company. Chancery subpœna. Returnable to rule day first Monday in September, A. D. 1893. Geo. F. Sharitt, clerk. By J. F. Shearman, deputy. Filed July 28th, A. D. 1893. Geo. F. Sharitt, clerk.

9 In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

To Geo. F. Sharitt, Esq., clerk of the circuit court of the United States, district of Kansas:

You will please enter our appearance for the defendant, The Missouri Pacific Railway Company, in the above-entitled suit.

Yours, etc.,
B. P. WAGGENER,
J. H. RICHARDS,
Solicitors for Defendant, Fort Scott, Kansas.

Fort Scott, Kansas, August 29th, 1893.

Indorsed: 390. The United States of America *vs.* The Missouri Pacific Railway Co. Appearance for The Missouri Pacific Railway Co. d'f't. Filed Sept. 4th, 1893. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

Stipulation.

It is hereby stipulated and agreed that the time to plead in the above-entitled cause shall be extended until the November 1893, rule day.

Dated this 30th day of September, 1893.

W. C. PERRY, *U. S. Att'y.*

Indorsed: 390. U. S. A. *vs.* The Mo. Pac. R'y Co. Stipulation. Filed Oct. 3rd, 1893. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States in and for the District of Kansas, 2d Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the court shall enter up the following order of submission:

10 Defendant is given (—) to file demurrer to complainant's (*file*) within five days.

Case then to be submitted to the court upon briefs of counsel.

Defendant to hand up its brief within forty days.

Complainant shall have thirty days thereafter within which to file its brief.

Defendant may file reply brief within twenty days.

If demurrer is overruled, defendant may plead within twenty days thereafter.

W. C. PERRY, *U. S. Att'y.*
W. P. WAGGENER AND
J. H. RICHARDS,
For Def't.

Indorsed: 390. The United States of America *vs.* The Mo. Pac. R'y Co. Stipulation. Filed Jan'y 8, 1894. Geo. F. Sharitt, cl'k.

Entry on Journal, Jan. 8, 1894.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Order.

The U. S. att'y W. C. Perry and J. H. Richards, attorney for defendant appearing in open court this 8th day of Jan. 1894, and mutually agreeing to mode of procedure to bring this suit to issue and having reduced said agreement to writing and filed the same in this court, the court being fully advised in the premises, orders and decrees that the defendant file *his* demurrer to complainant's bill within five days; case then to be submitted to the court upon briefs of counsel; defendant to file its brief within forty days; complainant to file brief within thirty days thereafter and defendant to reply within twenty days.

If demurrer is overruled defendant to plead within twenty days.

In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

The Demurrer of the Above-named Defendant, The Missouri Pacific Railway Company, to the Bill of Complaint of the Above-named Plaintiff.

11 This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill, and for causes of demurrer showeth:

I. That it appeareth by the plaintiff's own showing by the said bill, that it is not entitled to the relief prayed by the bill against this defendant.

II. That the said bill is exhibited against this defendant for several and distinct and independent matters and causes which have no relation to each other, and in which, or in the greater part of which, this defendant is in no way interested or concerned, and ought not to be implicated.

III. That this defendant is not answerable to said complainant, but to some other persons, whose names it cannot state.

IV. That the said bill does not embrace the whole matter concerning which the suit is brought. Wherefore this defendant may be harassed with other suits, and a multiplicity of suits may ensue.

V. That it appears by the said bill that there are divers other persons who are necessary parties to the said bill but who are not made parties thereto.

VI. That it appears by the said bill that the case of the said complainant is barred by the statute of limitations.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto. And it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON,
Solicitors for Defendant, The Missouri Pacific Railway Company.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

J. H. RICHARDS,
Solicitor for Defendant, The Missouri Pacific Railway Company.

12 STATE OF KANSAS, }
County of Bourbon, } ss:

J. H. Richards being duly sworn, deposes and says: I am one of the solicitors of the above-named defendant. The foregoing demurrer is not interposed for delay.

J. H. RICHARDS.

Sworn and subscribed to before me this 11th day of January, A. D. 1894.

[SEAL.]

GEO. O. BACON,
Notary Public, Bourbon County, Kansas.

My commission expires Aug. 6, 1895.

Indorsed: 390. U. S. *vs.* The Mo. Pac. R'y Co. Demurrer. Filed Jan'y 12, 1894. Geo. F. Sharitt, cl'k.

United States Circuit Court, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant.

This case is submitted to the court upon a demurrer by the railway company to the bill of complaint. For the purposes of this submission the facts alleged in the complaint are to be taken as true. The bill avers that "this action is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is given and made in pursuance of the request of the Interstate Commerce Commission of the United States, that the United States attorney for the district of Kansas be directed and authorized to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate-commerce law against the defendant in relation to the matters hereinafter complained of."

The facts as set forth show the defendant railway company to be a common carrier owning the lines of railway and engaged in interstate commerce, between the cities of St. Louis, Missouri, Wichita, Kansas and Omaha, Nebraska. The distance from St. Louis to Wichita is 458 miles; to Omaha 501 miles. That all freight on defendant's lines to the two cities going to and from St. Louis passes over 232 miles of the same track, to Holden, Missouri, thence on separate lines to Wichita 226 miles, to Omaha 269 miles, being a haul of 43 miles less to Wichita than to Omaha.

The bill further sets out in detail the schedule rates of freight to the two cities showing that about one hundred per cent. greater rates are charged to Wichita than to Omaha, on the same
13 kind and classification of freights, and this while the shipments are made as alleged contemporaneously and under similar circumstances and conditions. It is further alleged that such rates are "unreasonable, excessive and exorbitant," and are unjust discrimination against the city of Wichita. That the city of Wichita is a general distributing point for a large scope of country embracing central and southern Kansas and the Indian Territory and Oklahoma, and that these exorbitant and unjust rates and this unlawful discrimination against the city of Wichita and its distributing territory, cause great and irreparable prejudice and injury to the citizens of the United States and the public generally engaged in and affected by this interstate commerce between St. Louis and Wichita.

The provisions of the interstate-commerce (—) upon which the charges are based are as follows:

Section one of "An act to regulate commerce" provides:

"That all charges made for any services rendered, or to be rendered, in the transportation of passengers or property aforesaid, or in any connection therewith, or for receiving, delivering, storing or handling such property shall be reasonable and just; and every

unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section two provides:

"That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any services rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section three provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or subject *to* any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

14 If the allegations of the bill are true, and they are so taken on demurrer, there seems to be no room for doubt as to the violation of the law by the defendant company.

In the able briefs presented by counsel for the respective parties the main point of controversy is, first, as to the right of the United States to maintain such a complaint against defendant in any form, and, second, as to the form in which that remedy is to be sought.

Counsel for defendants very tersely state their case as follows: "It is the theory of the defendant that the complainant has stated in its bill no just or sufficient facts to constitute a cause of action in its behalf against this defendant; that as a matter of law, the United States of America has not, pursuant to an act to regulate commerce, upon which this bill is founded, a cause of action against this defendant, and that this court has no jurisdiction, and cannot, by virtue of said act, or other power or right, draw unto itself original and independent jurisdiction to try said cause."

In view of what, upon the face of the bill, would seem to be a very gross violation of the express prohibitions of the interstate-commerce act, there certainly ought to be a remedy somehow and somewhere, there ought to be a means of compelling defendant company to obedience to this law. The whole object, intent and design of the interstate commerce act, with its sweeping clauses, and far-reaching and all-providing prohibitions, was to provide a safe, easy and expeditious mode of reaching and preventing just such abuses as are charged in this bill.

That relief may be had through a court of equity by injunction in such cases where the proper parties are before the court, is abundantly supported by the authorities and as a general proposition will

hardly be questioned. But, say the counsel for defendant we have here neither the proper parties nor the proper forum.

By act of Congress, February 10, 1891, the 12th section of the original act was amended by inserting after the first clause a provision which seems to have a special bearing on this question.

The amendment is shown in italics as follows: "*and the commission is hereby authorized and required to execute and enforce the provisions of this act; and upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply, to institute in the proper court, and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States,*" etc.

Now this amendment means something. It is couched in the language of a grant of new authority, and imposes additional requirements as to the rights and duty of the commission to see to it that the law is enforced. And a significant fact in this connection is that this enactment follows and might appear to be the logical sequence of the condition of things prior to the passage of the amendment as shown by the report of the commission on the 1st day of December 1891 and of the rulings of the courts in reference to the powers of the commission prior to the passage of that amendment.

In Fifth Annual Report, 1891 (p. 14–19), the commission says:

"Though required to execute and enforce the provisions of the act, the commission not being invested with power to enforce its own orders, is dependent for the efficiency of such execution and enforcement upon the courts.

"Within the year, and in compliance with the provisions of section 16 of the act, applications have been made by petition to the United States circuit court, and suits are now pending for the enforcement of the orders, which with a single exception were made in previous years."

Attention is called to the fact that the orders of the commission made in previous years were then going through the slow process of enforcement by the courts. This is what is by the counsel for the defendant forcibly styled "the circumlocution of procedure in the hitherto established ways."

To avoid this "circumlocution," and afford a speedy remedy is obviously desirable if it can be accomplished.

The abuse charged in the bill affects the public and is pecuniary in its nature. The injury is suffered by a large number of citizens of the United States through the alleged wrong-doing of the defendant in its quasi-public character of a great corporation engaged in interstate commerce, and under the direct protection, control and prohibition of the laws of the United States. The United States is bound to its citizens for the enforcement even of the criminal prohibitions of the statute leveled at all violations of the duties owed to the public by such common carriers.

16 Section 10 of the act makes any violation of the provisions of the act a misdemeanor punishable by a fine not exceeding $5000.

The act was passed by the Congress of the United States in pursuance of a right reserved by the Constitution to regulate interstate commerce. With this right to legislate on the subject goes the corresponding duty of the United States to protect the public interests, when invaded by violations of the rules laid down and prescribed by this law.

Here we have by the averments of the bill a case where thousands of her citizens, spread over a large territory, are being injured daily in their property rights and commercial interests, by a violation of this law in many of its most important features.

The only practicable remedy would seem to be by an equitable injunction against such practices and it would appear eminently right and just that the Government should move in the matter for the protection of its citizens, and to enforce obedience to its laws on the part of this great corporation, acting in its capacity of a quasi-public servant. These views are in harmony with, and supported by, many adjudicated cases maintaining the authority and duty of the sovereign to protect the public interests from unjust invasion and violation.

It is contended that even if the United States might bring such a complaint, it could be done only by proceedings initiated through the commission. That the remedy provided by the act is exclusive, and that access to the courts in such cases is solely and only through and by way of the commission. That a formal preliminary investigation by the commission is essential to vest jurisdiction in the court.

There is no question but that this is one way to reach the court; and it was at first doubtless deemed desirable as a ready mode of bringing the parties together, and enabling them in a spirit of mutual concession to adjust amicably and fairly their differences before the commission.

But in practice it seems the inherent defects of the system were very soon felt, in that the decisions of the commission did not decide anything, and its orders were not enforceable except upon the voluntary submission of the offending party.

In Kentucky & I. Bridge Co., *v.* S. & N. Rd. Co., 37 Fed. Rep. 567, cited by counsel for defendant, Judge Jackson in commenting on the relative powers of the commission and the courts, says:

17 "The act to regulate commerce does not undertake either to create an 'inferior court' or to invest the commission appointed thereunder with judicial powers or functions. It is invested with only administrative powers of supervision and investigation, which fall far short of making it a court, or its action judicial, in the proper sense of the term. Its action or conclusion upon matters brought before it for investigation is neither final nor conclusive; nor is it invested with any authority to enforce its decision or award. It hears, investigates and reports upon complaints made before it, but subsequent judicial proceedings are contemplated and provided for as the remedy for the enforcement of the order or report of the com-

mission in all cases where the party against whom its decision is rendered does not yield voluntary obedience thereto.

"The act does not make the circuit court the mere executioner of the commissioners' order or recommendation, so as to impose upon the court a non-judicial power.

"The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the commissioners' report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the case *de novo*, upon proper pleadings and proofs; the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

This was in January, 1889, that Judge Jackson so plainly shows the defects of the commission as affording no final judicial settlement of controversies. As he well says upon the circuit court of the United States "the jurisdiction is conferred of enforcing the rights, duties and obligations" recognized by the interstate-commerce act. When cases begun before the commission reach the courts the only legal effect given by the act to the findings of the commission is to make them simply *prima facie* proof of the facts found, subject to be relitigated on a trial *de novo* as to the whole matter.

This decision and others in line with it, and the report of the commission in 1889, heretofore cited, in which complaint is made of the want of any ready means of enforcement of the decisions or orders of the commission, may well have led Congress to the enactment, on Feb'ry 10, 1891, of the amendment to sec. 12, of the act, cited *supra*, and may throw some light too upon the proper construction of the amendment.

18 When this amendment is considered, particularly in its historical connection with the first clause of the act, it seems impossible to escape the conclusion that it was intended to confer upon the commission a power and a direction to avoid this happily styled "circumlocution of procedure in the hitherto established ways" and to afford a speedy and effective means of bringing the offenders immediately before courts of competent jurisdiction to answer both civilly and criminally for their violation of the law. The language of the amendment is "and the commission is hereby authorized and required to execute and enforce the provisions of this act; and upon the request of the commission, it shall be the duty of any district attorney to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof."

This was after four years' trial of the practical operations of the commission, and painful experience of its inherent defects, so far as concerned the ultimate and final relief sought for by the honest

citizen contending against the abuses practiced by these great corporations.

The "preliminary investigation" was not only inefficient to right his wrong by any binding adjudications, but often, even where administered by the ablest jurists and best men in our country, was the means of piling up difficulties in his way, and creating new obstacles to the attainment of his rights.

Now this amendment in just so many words places the power in their hands and imposes upon their conscience the duty of seeing that this interstate-commerce act shall be enforced, and that there may be no delay in the matter it is added "and upon the request of the commission it shall be the duty of any district attorney, etc.," as cited *supra*. This request of the commission is alleged in the bill. It will be noted that the U. S. attorney when called upon is not merely to prosecute by indictment for the criminal feature of the violation of the law—which of course is done without the formal preliminary trial—but in the very same connection and by the sanction of this same provision he is "to institute in the proper court and prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof."

The language of this amendment clearly distinguishes the remedy from that provided in sec. 16, which is for an application to
19 the court for the enforcement of the orders of the commission. This is an application to be made by the proper United States officer "on the request of the commission," "for the enforcement of the provisions of this act, and for the punishment of all violations thereof."

"Punishment" refers to the prosecution for misdemeanors under sec. 10.

The clause "provisions of this act" occurs a score of times throughout the act, and except in a few instances where it is limited by the special matter to which it applies, is always used with reference to the great remedial features of the act, the rights protected and the wrongs redressed by it.

To reach a proper construction of this act and this amendment it must be kept in view steadily that the object of the creation of this commission was not merely to afford, as was supposed, a ready method of settling controversies between individual shippers and the common carriers, but it had a far wider sweep and higher scope and design, which was by affirmative action on the part of the commission on its own motion to have instituted and carried through, proceedings for the correction of abuses and the righting of wrongs, which affected the public commercial interests. And this, even, without the intervention of individual litigants at all. In section 16, it is made the "duty of the commission" and is "lawful for any company or person interested" to make the application there provided for.

That is merely to carry out and have executed by the courts the orders already made by the commission.

But the amendment to sec. 12 obviously contemplates the action

of the commission in causing original proceedings to be instituted in the proper courts for the enforcement of the act. Not only is the commission wanting in judicial authority to execute its decrees, but is also unlike the court in that it is not to wait for injured parties to appear at its door to prefer their complaints. It is actively and aggressively to "inquire into the management of the business of all common carriers" and to keep itself "informed as to the manner and method in which the same is conducted" and to obtain from them "full and complete information necessary to enable the commission to perform and carry out the objects for which it was created." These extracts are all from the first clause of sec. 12 of the act and following this is the next clause (quoted *supra*), which lays upon the commission broadly the duty to see to the enforcement of the wise and beneficent provisions of the act; and to that end whenever a proper case is found, its duty is plainly to call upon the United States, 20 th-ough its appointed officer the district attorney, to institute the necessary proceedings to right the wrongs and correct the abuses found to exist. The language of this clause is imperative "is authorized and required to execute and enforce."

And upon such request the district attorney shall "institute in the proper court" the "necessary proceedings for the enforcement of the provisions of this act."

In accomplishing the enforcement of the civil features of the act the commission bears much the same relation to the court that the grand jury does in criminal matters. By the methods provided under the act, and they are ample, the commission is to keep itself thoroughly informed as to all the operations of every common carrier in the United States engaged in interstate commerce, and whenever in the course of its investigations it discovers abuses which affect the public commercial interests injuriously its duty is at once to have such abuses suppressed and if need be to call in the strong arm of the Government through its appointed courts to enforce the provisions of the law.

In this case the allegation is made that the action is prosecuted "in pursuance of the request of the Interstate Commerce Commission of the United States," and "under direction of the Attorney General of the United States." These prerequisites for the bringing of the action are safeguards against the indiscriminate and ill-advised prosecutions apprehended by counsel for defendant. It is not to be supposed that the commission and the Attorney General of the United States would lend the sanction of their authority and direction to institute such proceedings except in cases where after due consideration their judgments dictated the necessity for the interposition of the strong arm of remedial justice.

Without attempting to follow counsel in detail through the able and exhaustive presentation of cases in their briefs, the court is of the opinion that the course pursued in the bringing of this action is sustained by the great current of authority as applied to the acts of Congress under which it is instituted. The invasions of great property rights, as distinguished from questions of mere sentiment or public policy, are in apt terms alleged in the bill. These property

rights are such as by the act of Congress the United States is bound to protect and enforce, and by a court of equity alone could any full and complete remedy be afforded. The demurrer to the complainant's bill is therefore overruled.

Indorsed: 390. Opinion. Filed Sep. 14, 1894. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

21 Entry on journal, Sept., 14, 1894.

J. B., 232.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

Now on this day the court having duly considered the demurrer to the bill of complaint heretofore filed herein by the defendant and being fully advised doth overrule the same, to which ruling of the court the defendant duly excepted and excepts.

Thereupon upon application of the said defendant it is ordered by the court that it be and is hereby given forty days within which to elect whether it will file its answer to said bill of complaint herein or will stand upon its said demurrer.

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

The Answer of the Missouri Pacific Railway Company to the Bill of Complaint of the United States of America.

This defendant now, and at all times, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the errors or uncertainties or other imperfections in said bill of complaint contained, for answer thereto or unto so much of such parts thereof as said defendant is advised is or are material for it to answer unto, says as follows:

First. It admits that it is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and that it was at the time of the filing of said bill of complaint, and is now, a common carrier of all classes and kinds of freight commonly carried and transported by railroad companies between the city of St. Louis in the State of Missouri, and the city of Omaha, in the State of Nebraska, and the city of Wichita, in the State of Kansas, and points intermediate thereto; but it denies that it is a corporation of the State of Kansas identical with the corporation incorporated in and known as the Missouri Pacific Railway Company of Kansas; and it alleges the fact to be that it has its principal office in the city of St. Louis and State of Missouri.

22 It admits that all shipments of freight between the city of St. Louis and the city of Wichita, and all shipments of freight between the city of St. Louis and the city of Omaha over its lines pass over the same track between the city of St. Louis and the city of Holden in the State of Missouri, as alleged in said bill of complaint but denies that from said last-named point the said defendant has two lines of railroad, one of which runs in a northwestern direction to the city of Omaha, in the State of Nebraska, a distance of 500 miles from the city of St. Louis, as alleged in said bill of complaint, and another which runs in a southwestern direction to the city of Wichita, in the State of Kansas, a distance of 458 miles from said city of St. Louis; but alleges the fact to be that it has over a part of said distance and between the said cities of Holden and Omaha, and the said cities of Holden and Wichita, lines of transportation over which freight and traffic is moved; and this defendant further denies that it owns all of said lines of railroad between the said cities of St. Louis and Omaha, and the said cities of St. Louis and Wichita over which it moves traffic, as alleged in said bill of complaint; and alleges the fact to be that that part of the line or lines lying in Kansas and over which freight is carried between the said city of Holden and the said city of Wichita belongs to a railway corporation known as the Kansas & Colorado Pacific Railway Company, organized under and by virtue of the laws of the State of Kansas.

Second. This defendant admits that it had at the time of the filing of this suit and for some time prior thereto maintained in force upon its railroad the tariffs and schedules of freight rates governing all freight traffic passing between the said cities of Wichita, Omaha and St. Louis by means of which it charged, demanded, collected and received compensation for the transportation of property and freight between said cities, and which said tariffs and schedules are set out in said bill of complaint; but it specifically and expressly denies the averments of said bill of complaint that said tariffs, rates, schedules and charges are unjust or unreasonable, excessive or exorbitant, or that they constitute an unjust and unreasonable discrimination against shippers, or that said tariff, rates and schedules, rules or regulations subject persons shipping between the said city of Wichita and the said city of St. Louis, or the localities of Wichita or St. Louis, to an undue or unreasonable prejudice or disadvantage, as alleged in said bill of complaint, by reason of the fact that the charges made in pursuance of said tariffs, rates, rules and regulations are in excess of the charges made by said defendant for like and cotemporaneous service of transportation of property between the said cities of Omaha and St. Louis under substantially simi-

23 lar circumstances and conditions, and expressly denies that such schedules, rates and charges are in that particular excessive, exorbitant and unjust; but this defendant alleges the fact to be that the difference between the schedules, tariffs, rates and charges demanded and collected between the said cities of St. Louis and Omaha, and the said cities of St. Louis and Wichita are wholly owing to the fact that the conditions and circumstances are substantially dissimilar between the St. Louis-Omaha line or lines, and the

St. Louis-Wichita line or lines, and are wholly governed by causes over which this defendant has no possible control.

Further denying, and defending against the averments of said bill of complaint, this defendant says:

1. That there is great dissimilarity of circumstances and conditions in respect of (1) the length and character of haul; (2), cost of service; (3), volume of business; (4), conditions of competition; (5), storage capacity and geographical position; (6), situation of different terminal points; (7), competition by water transportation and by many railroad lines; (8), by reason of many commercial advantages; (9), by reason of the environments of the respective cities of Wichita and Omaha, together with other substantially dissimilar circumstances and conditions.

2. The relative rates between the said cities of St. Louis and Omaha, and the said cities of St. Louis and Wichita are further controlled by the further following facts, circumstances and conditions, to wit, the Mississippi river is the basing line for all rates for territory lying west thereof between it and the Missouri river, and the Missouri river is a basing line of all rates between it and Wichita; that the rating of all shipments of freight originating in the Middle and Eastern States having destination in the States of Iowa and Nebraska and other Trans-Mississippi territory is found by adding the rate from point of origin to the Mississippi river, and the rate from the Mississippi river to the point of destination; that the rates to the cities located on the Mississippi river from Clinton, Iowa, on the north, to St. Louis on the south, both inclusive, on business from the manufacturing and other industrial districts in the Middle and Eastern States destined to the Missouri river are alike to all; that all the Mississippi River cities located within these limitations are entitled by location and otherwise to compete and do compete for the trade of the cities located on and west of the Missouri river, Omaha to Kansas City, inclusive, so that the rate to any one of them must of necessity be no higher than those governing from any of the others in order to permit shipment to them of products
24 and freight from the East and reshipment thence to the consuming territory; that the measure of the rate charged from such Mississippi River crossings to Omaha is the schedule and rate maintained by the short lines from the principal Mississippi crossings across the State of Iowa to Omaha; that the distance of some of these, for instance, from Burlington to Council Bluffs, Iowa, via the C. B. & Q. is but 293 miles; from Davenport via Rock Island railway, 316 miles; from Clinton, Iowa, via C. & N. W. 350 miles; that the distance from St. Louis to Omaha via the Wabash railroad which is the short line, is only 280 miles, which line by reason of being the short line, absolutely controls the tariff between the said cities of St. Louis and Omaha; that the Missouri Pacific railway from St. Louis to Omaha runs through an agricultural territory and serves many important business centers, as, for instance, Jefferson City, Sedalia, Kansas City, Atchison, St. Joseph; that owing to the large amount of local business of all kinds, and the further fact that the service for the local business is utilized for the through busi-

ness, the train service having to be maintained for the local business, the compensation for the total through business and local business is barely compensatory upon the basis of the aforesaid schedules; that this defendant is compelled to take and do business at the rate of such schedules or withdraw from that territory; that such withdrawal would simply result in lifting the Missouri Pacific railway out of such traffic without accomplishing any corresponding benefit to the city of Wichita or to the public in general; that these are conditions, circumstances and environments entirely beyond the control of this defendant and are conditions that do not exist as to the city of Wichita, or Wichita business, either from St. Louis or the eastern seaboard; that as between the said cities of Omaha and Wichita there is the further difference that the Missouri river is a basing line which extends from all Missouri River points to Kansas City, and thence southerly through the cities of Fort Scott, Kansas, and Joplin, Missouri; that the city of Wichita lies about — miles from what is known as the Missouri River basing line; that tariff at the Missouri River line is influenced largely not only by volume of business, competition, cost of transportation and other elements affecting the rates, but also by the fact that the Missouri river is in fact in a measure and potentially in a much larger measure, favored by water transportation; that the city of Omaha is likewise affected by the same condition, being located upon the Missouri river.

3. That the rates west of the Missouri River crossings and the Missouri River basing line extended as aforesaid and the city of Wichita are necessarily still further augmented by the following conditions, to wit:

The following lines of railway run into and through the city of Wichita, and did so run at the time of the filing of said bill of complaint: The Missouri Pacific railway, over the Kansas & Colorado Pacific railway; the Atchison, Topeka and Santa Fe railroad; the St. Louis and San Francisco railway, and the Chicago, Rock Island & Pacific railway; that all of these lines are branch lines except the St. Louis and San Francisco and the Chicago, Rock Island & Pacific railroads, which former road is now and was at the time of the filing of said bill of complaint, controlled and operated by the Atchison, Topeka & Santa Fe Railroad Company; that of these only two, the Missouri Pacific and the St. Louis & San Francisco railroads run between the cities of Wichita and St. Louis; that of these only the Missouri Pacific and the Chicago, Rock Island & Pacific railway connect with both the city of Omaha and the city of Wichita; that the intermediate towns between the Missouri river and the city of Wichita are generally much less numerous and of much less commercial importance than upon the line between St. Louis and Omaha; that the country is much more sparsely settled; that while the country in the region of Wichita and for a large part of the distance between the Missouri river and Wichita, is wholly an agricultural country, without any mineral resources whatever, the crops, especially in the vicinity of Wichita, and the country tributary thereto, have been exceedingly uncertain and

precarious; that the fuel consumed in the operation of defendant's line of railway between the eastern line of the State of Kansas and the city of Wichita has to be hauled onto its lines at great expense, and that owing to the reduced and restricted volume of business it is necessary to handle much of the freight both in and out in less than car-load and less than train-load lots, thus greatly increasing the expenses of service; that these unfavorable conditions do not as a rule obtain with reference to the city of Omaha; that the population of the city of Wichita is probably only about half the population of the city — Omaha; that the said city of Wichita has as many through main lines of railroad as the city of Omaha; that whereas said city of Omaha is located upon the Missouri river, potentially navigable if not in fact, in the center of a large agricultural area and convenient to coal and other fuels, the city of Wichita is a long distance from any navigable stream, potential or in fact, often with insufficient water supply, and insufficient and deficient fuel and timber supply; for train service; that whereas the said city of Omaha has, as this defendant is informed and believes, a large and flourishing stock yards and packing-houses, the packing-houses and
26. stock yards of the city of Wichita have, not by reason of the alleged discriminations, as charged, but as this defendant believes, and is informed, by reason of the recent repeated and continued failure of crops almost if not quite suspended operation; that many other dissimilar conditions and circumstances exist; that these are conditions and environments entirely beyond the control of this defendant; that the circumstances and conditions therefore under which the Omaha-Wichita freight rates are handled are not substantially similar, but substantially and wholly dissimilar.

Third. This defendant further expressly denying that it by any mode or means discriminates in favor of the said city of Omaha against the said city of Wichita, or by any mode or means exercises undue preferences to the detriment and hindrance of commerce and trade between the said cities and between the said localities, or that it in any manner subjects the said localities of Wichita and St. Louis to any unreasonable and undue prejudice and disadvantage by reason of the alleged fact that the charges made in pursuance of said tariff rates, rules and regulations, are in excess of the charges made by it for like and cotemporaneous service for the transportation of property between the city of Omaha and the city of St. Louis, under substantially similar circumstances and conditions as it is alleged, alleges the fact to be that there is no possible relation of commerce, or of business, or competition, existing between the said cities of Omaha and Wichita upon which a charge either of discrimination or undue or unreasonable preference, prejudice, or disadvantage may be predicated, but that upon the contrary there is little or no competition whatever between the two cities in any St. Louis market, or other market wherein the rates between the said cities and the city of St. Louis are involved, and that the schedule or schedules referred to and the rates which this defendant so made or makes between the cities of St. Louis and Omaha do not operate in any manner directly or indirectly to affect either the prosperity of the city of

Wichita, the people interested in her municipal welfare or the sale or prices of her products or commodities in any market or markets in the country.

Fourth. Further answering said bill of complaint this defendant expressly denies that the schedules or rates complained of in said bill of complaint are in any manner affected with a public interest or are in any legal or proper sense detrimental to commerce and trade, or in any way directly or indirectly hinder commerce or trade, to the injury of the localities or municipalities in question, or to the public at large, or to the people of the United States, or
27 to the United States of America; and this defendant avers and shows the fact to be that neither the public nor the United States of America nor the people at large nor any one nor any locality or municipality outside of the municipality of the city of Wichita is either directly or indirectly concerned or interested in or affected by any tariff or rate or schedule complained of in said bill of complaint.

Fifth. This defendant further denying as alleged in said bill of complaint, that but for the acts complained of the said city of Wichita would carry on a large and profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight, and that said defendant's railroad between said cities of St. Louis and Wichita with its western and southern connections with other roads at the city of Wichita would but for such fact, constitute one of the principal thoroughfares in freight traffic between the Mississippi river and the Pacific ocean and between the Mississippi river and the gulf of Mexico at the city of Galveston, alleges the fact to be that its line of railroad from the city of St. Louis to the city of Wichita has no direct through or continuous line or connection and no direct operation between the Mississippi river and the western seaboard or Pacific coast, or the gulf of Mexico or the city of Galveston, either over its own lines or over the lines of other roads, so as to be able to control, fix or make through tariffs and that its own line of road running to the city of Wichita ends at the town of Kiowa, on the southwest, and the town of Kanapolis on the northwest; and this defendant further expressly denying that by reason of any unjust or excessive charge for freights or any unreasonable or unjust preferences or discriminations as charged in said bill of complaint, chargeable against this defendant, the said city of Wichita has been limited or restricted as a distributing point for central and southern Kansas or the Indian Territory or Oklahoma, or that it has by virtue of said schedules prevented it from furnishing, as alleged, an extensive market with freight of all classifications or limited or restricted the use or usefulness of its stock yards or its shipment of live stock, as alleged in said bill of complaint, alleges the fact to be if it has been restricted, as this defendant does not doubt that it has, as a general distributing point for either southern Kansas or the Indian Territory or Oklahoma, or all of these, or as a market for freight of any kind, or if the stock yards located at said city of Wichita have not done the business which they may have done in former and more prosperous times, these conditions are not

attributable to any charges or schedules which it makes either to or from Wichita or to or from the said city of Omaha, as it is
28 alleged; but altogether to conditions, causes, influences and environments over which this defendant has no control and which inhere wholly in location, climate, market, distance, cost of service, competition, volume of trade, and other environments for which this defendant is in no manner responsible.

Sixth. Defendant further avers and shows that no complaint has ever been filed with the Interstate Commerce Commission of anything done or omitted to be done by defendant company in respect of said schedules in contravention of the provisions of the interstate-commerce act and as required by law; that no such complaint has ever been forwarded or presented to this defendant, or demand made upon it for reparation for any alleged injury as required by law; that the Interstate Commerce Commission never as matter of fact investigated such or any complaint or the alleged question at issue between this defendant and the city of Wichita in fact or as required by law; that said commission has never made an order, recommendation, report, or finding upon the issues between the complainant and this defendant as required by law; that it never was in fact made to appear to the satisfaction of the commission that anything had been done or omitted in violation of the act or of any law cognizable by the commission or that any injury had ever been sustained by the complainant as required by law; that no notice to cease or desist from any alleged violation or to make reparation for any alleged injury within any time named by the commission, or any opportunity given this defendant to make reparation for any alleged injury within any time named by the commission, as required by law; that this defendant never violated or refused or neglected to obey or perform any lawful order or requirement of the commission, or of any court relating thereto; that this suit was never in fact brought by the authority of or under the direction of the Attorney General of the United States made in pursuance of the request of the Interstate Commerce Commission of the United States, as required by law; that said commission never in fact made any request that the United States attorney for the district of Kansas be directed and authorized to institute and prosecute the proceedings against this defendant in the mode and manner required by law; that the schedules complained of in the bill of complaint herein have been lawfully made, published and approved by the Interstate Commerce Commission, as required by law; that said commission has never, agreeably to the provisions of the law in that regard duly caused a properly authenticated copy of any report in respect of the matters at issue in said complaint, together with any order or notice aforesaid, to be delivered to this defend-
29 ant; that such schedules had been for years prior thereto and were at the time of the filing of said bill of complaint in full legal force and effect unimpeached by the commission or by any court, and that no charge had ever been made or proven that it was illegal or unjust or discriminatory in its character; that

no order has ever been made by the commission in relation thereto as required by law;

Wherefore and by reason of the aforesaid matters and things this defendant is advised by counsel and therefore avers that the act under which and upon which it is alleged in said bill of complaint this suit is founded does not authorize or empower the commission, or the Attorney General of the United States, or the district attorney for the State of Kansas, to institute this suit.

And this defendant is advised by counsel and therefore avers that neither by virtue of said act nor any other right or power has this court jurisdiction nor can it draw unto itself jurisdiction under the facts and circumstances presented by said bill of complaint and the issues hereby joined to hear and determine this suit.

Seventh. This defendant is advised by counsel and therefore avers that the United States of America has no just cause of complaint against this defendant that this defendant has never either directly or indirectly by making or enforcing the schedules complained of in this bill of complaint done injury to either the United States of America or any officer thereof nor to the public at large, and that the United States of America having no just cause of action or of complaint either at law or in equity against this defendant by reason of making or enforcing the schedules, tariffs and rates charged in said bill of complaint, is unduly and unjustly harassing and oppressing this defendant in an illegal and unjustifiable prosecution of this suit.

Eighth. Defendant further alleges and charges the fact to be that the issues involved in this suit cannot be fairly determined for the reason that the railway companies who are responsible for the rates and schedules in question are not parties hereto and should be made parties in order to a full and complete determination of the issues.

That the following-named carriers are responsible for the rates to Wichita, from the Mississippi and Missouri River crossings:

The Chicago, Rock Island & Pacific Railway Company;

The Atchison, Topeka & Santa Fe Railroad Company;

The St. Louis & San Francisco Railway Company.

30 And inasmuch as any change in the rates to Wichita will seriously and generally affect the rates of freight all over the State of Kansas, all other lines interested in traffic to and from the State of Kansas should necessarily become parties to this suit, viz:

The Missouri, Kansas & Texas Railway Company;

The Kansas City, Fort Scott & Memphis Railway Company;

The Union Pacific Railroad Company;

The St. Joseph & Grand Island Railway Company;

The Kansas City, Wyandotte & Northwestern Railway Company;

The Burlington & Missouri River Railroad Company;

The Hutchinson & Southern Railroad Company;

The Kansas City, Pittsburg & Gulf Railway Company;

And inasmuch as the final determination of this suit is likely to affect the rates between the cities of Omaha and St. Louis, and inasmuch as the lines running between the Mississippi River crossings between Clinton, Iowa, and St. Louis and Omaha inclusive and the

city of Omaha make and control the rates, tariffs, and schedules on all classifications of freight between the city of St. Louis and the city of Omaha over defendant's line of railway, and it is powerless to make or reduce the rates, such lines are indispensable parties to the complete and final determination of the rates involved, and should be made parties to this suit. They are:

The Wabash Railroad Company;
The St. Louis, Keokuk & Northwestern Railway Company;
The Burlington & Missouri River Railroad in Nebraska;
The Chicago, Burlington & Quincy Railway Company;
The Illinois Central Railway Company;
The Chicago, Milwaukee & St. Paul Railway Company;
The Chicago, Northwestern Railway Company;
The Fremont & Elkhorn Valley Railroad Company;
The Chicago, St. Paul, Minneapolis & Omaha Railway Company;
The Chicago & Great Western Railway Company;
The Chicago & Alton Railway Company.

Wherefore, this defendant asks and prays this honorable court to make an order of intervention requiring the complainant herein to make all of said railway and railroad companies codefendants to this suit. And avers that each and all of such parties and companies are indispensable as the radical change involved, or indeed any change would not only seriously affect and upset rates in all
31 said territory, but likewise seriously affect shippers and shipping interests in all said territory.

Ninth. This defendant specially and expressly denies that the wrongs herein complained of are remediless in the premises at law, or only relievable in a court of equity and under the form of procedure instituted, but alleges the fact to be that the real party in interest, to wit: the municipality and locality of Wichita, together with any and all other persons or parties having any pretended or just cause of action against this defendant, and as well also the complainant, The United States of America, have under and by virtue of the provisions of the aforesaid act of interstate commerce, and in the courts of the State of Kansas, easy, adequate and complete remedies at law for every possible form of excessive charge, discrimination or undue preference, and for the correction or amendment of any alleged unlawful or oppressive schedule, rate or tariff, and this defendant is advised by counsel and avers the fact to be that under the law in such cases made and provided and applicable to proceedings for the prevention of unreasonable charges or unlawful discrimination or undue preference, this court is without jurisdiction to hear and determine this cause without the same having first been submitted to and passed upon by the Board of Interstate Commerce Commission as specifically provided by the terms of said act.

Wherefore this defendant, having fully answered to the said bill of complaint in so far as it is advised the same is material and necessary to be answered unto denies that the said complainant is entitled to the relief or any part thereof in said bill of complaint demanded, or any relief whatsoever; prays the same advantage of its aforesaid answer as if it had pleaded and demurred to said bill of complaint,

and prays to be hence dismissed with its most reasonable charges in this behalf most wrongfully sustained.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Defendant*,
By B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON, *Solicitors*.

THE UNITED STATES OF AMERICA, }
Second Division for the District of Kansas. }

On this 23rd day of October, 1894, before me, the undersigned, a notary public, at Fort Scott, Kansas, appeared the within-named J. H. Richards, and made oath:

32 That he is the general attorney of the defendant, The Missouri Pacific Railway Company, and vice-president of the main line of road in question within the State of Kansas.

That he signed the said answer as such officer by authority of the said company.

That he has read the same and knows the contents thereof, and the matters stated therein as of his own knowledge are true, and as to the matters stated upon the information of others he believes to be true.

J. H. RICHARDS.

Subscribed and sworn to before me this 23rd day of October, 1894.

My commission expires Aug. 6, 1895.

GEO. O. BACON,
Notary Public, Bourbon County, Kansas.

Indorsed: No. 390. The United States of America *vs.* The Missouri Pacific Railway Company. Answer of The Missouri Pacific Railway Company, defendant. Filed Oct. 24th, 1894. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant, }
vs. } In Equity.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. }

Exceptions Taken by the Above-named Complainants to the Answer of the Defendant.

First exception. For that the said defendant has not, to the best of its knowledge, remembrance, information and belief, answered and set forth a full, just and sufficient statement of the facts as to what constitutes the substantially dissimilar conditions and circumstances in the matter of the difference between the schedules, tariffs, rates and charges demanded and collected between the cities of St.

Louis and Omaha, and the said cities of St. Louis and Wichita; and particularly the complainants say that said answer is subject to exception because it does not aver in what respect there are substantially dissimilar conditions and circumstances: (1), in the length and character of haul; (2), cost of service; (3), volume of business; (4), conditions of competition; (5), storage capacity and geographical position; (6), situation of different terminal points; (7), competition by water transportation and by many railroad lines; (8), by reason of many commercial advantages; (9), by reason of the environments of the respective cities of Wichita and Omaha; and com-
33 plainants except to all of that portion of the second paragraph marked figure (1) of the answer above referred to, for the reasons hereinbefore stated, and also for the reason that said portion of said paragraph states conclusions and not facts.

Second exception. And the complainants also except to all of that part of the second paragraph of the answer marked figure 2, for the reason that the allegations therein contained do not state facts sufficient in law or equity to constitute a defense to the allegations of the bill admitted in the answer; and complainants except further to said matter so contained in the answer for the reason that the defendant had and has no legal right to agree to or bind itself by any contract or understanding making the Mississippi river a basing line for all freight rates to points lying west of the Mississippi river, and between that river and the Missouri river; and also because said defendant had no legal right to enter into or bind itself by any contract or understanding that any or all freight rates to points west of the Missouri river, or to the city of Wichita and the vicinity thereof, should be founded or based on any arbitrary line consisting in part of the Missouri river and an extension thereof southward through Fort Scott, Kansas, and Joplin, Missouri, of any such line; and also for the reason that the defendant in law is not authorized to fix the rates of freight to Omaha on the basis of the mileage between St. Louis and Omaha by the short line, and to justify itself in charging a larger rate of freight between Wichita and St. Louis, because the rate to Omaha charged by it is unprofitable; and further, because it is not averred that the tariff on freight between St. Louis and Wichita, if fixed on the Omaha basis, would not be profitable and remunerative to the defendant.

Third exception. And complainants except to the third paragraph of the answer for the reason that said paragraph is argumentative, and states conclusions rather than facts, and because it makes no difference whether there is or is not competition between Omaha and Wichita and in the St. Louis market, and said defendant does not fully answer complainants' bill of complaint.

Fourth exception. And the complainants except to the fourth paragraph of the answer for the reason that said paragraph states conclusions and not facts, and because said paragraph does not state facts sufficient to constitute a defense to the allegations of the bill admitted in said answer.

Fifth exception. Complainants except to the fifth paragraph

of the answer of the defendant for the reason that said
34 paragraph is argumentative, and does not state facts sufficient to constitute a defense to the allegations of the bill admitted in the answer, and states conclusions of law.

Sixth exception. And complainants except to the sixth paragraph of the answer for the reason that the matter therein pleaded has already been adjudicated in this court on the decision on the demurrer of the defendant to the bill of complaint, and because said matter is insufficient to constitute a defense to the admitted allegations of the bill.

Seventh exception. And complainants except to the seventh paragraph of the answer for the reason that the matter therein pleaded has already been adjudicated in this court on the decision on the demurrer of the defendant to the bill of complaint, and because said matter is insufficient to constitute a defense to the admitted allegations of the bill.

Eighth exception. Complainants except to the eighth paragraph of the answer for the reason that the issues involved in this suit can be fairly and fully determined without making any other person or corporation a party thereto.

Ninth exception. And complainants except to the ninth paragraph of the answer for the reason that the matter therein pleaded has already been adjudicated in this court on the decision on the demurrer of the defendant to the bill of complaint, and because said matter is insufficient to constitute a defense to the admitted allegations of the bill, and for the reason also, that it is not true that full and adequate relief from the wrongs complained of in the bill can be had by any proceeding at law.

In all of which particulars the said complainants except to the answer of said defendant as evasive, imperfect and insufficient, and humbly pray that the said defendant may be compelled to put in full and sufficient answer thereto.

W. C. PERRY,
United States Attorney and Solicitor for Complainants.

R. R. VERMILION, *Of Counsel.*

Indorsed: 390. Exceptions to answer. Filed Feb. 12, 1895. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

35 In the Circuit Court of the United States for the District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.
} In Equity. No. 390.

Motion of Defendant to Take Exceptions of Above-named Complainant from the Files.

Now comes said defendent, The Missouri Pacific Railway Company, and moves the court that each and every and all and singular of the pretended exceptions of above-named complainant to the answer of this defendant be taken from the files for the following reasons, to wit:

1st. Because each and every of said pretended exceptions is irregular, indefinite, and too general in its terms in this, to wit, that each and every of said pretended exceptions fails to point out specifically and definitely the matters, charges or interrogatories in said bill which it is claimed are not sufficiently answered, and fails to state the terms of the answer to such matters, charges or interrogatories.

2nd. Because exceptions do not lie to the answer of this defendant for the reason that defendant is a corporation and answer under oath was waived by complainant in the bill filed herein.

3rd. And defendant further moves the court that each and every of the third, sixth, seventh, eighth and ninth pretended exceptions of said complainant be taken from the files for the reasons aforesaid, and for the additional reason that each and every of said pretended exceptions relate to new matter set up in the answer by way of defense and not to matter which is not sufficiently responsive to the charge or interrogatories of the bill.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Defendant*,
By B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON, *Solicitors.*

Indorsed: No. 390. The United States of America, complainant, *vs.* The Missouri Pacific Railway Company, defendant. Motion of defendant to take complainant's exceptions from the files. Filed Feb. 28, 1895. Geo. F. Sharitt, clerk, by J. F. Shearman, D. C.

36 Entry on Journal, March 13, 1895. J. B., 458.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

Now upon this day this cause came on to be heard upon defendant's motion to strike from the files complainant's exceptions to the answer herein and said motion is argued and submitted and the parties are given leave to file briefs upon said motion.

In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

The motion of the defendant to take the exceptions of the plaintiff to the defendant's answer from the files coming on to be heard, the court being well advised in the matter, it is ordered and adjudged that said motion be and the same is hereby overruled, to which ruling the defendant at the time duly excepted and excepts.

JNO. A. WILLIAMS, *Judge.*

Indorsed: 390. Order. Filed Dec. 16, 1895. Geo. F. Sharitt, clerk, by J. F. Shearman, D. C.

In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

This cause coming on to be heard upon the exceptions of the plaintiff to the answer of the defendant, and the court being well advised in the matter, it is ordered and adjudged that said exceptions be and the same are hereby in all things sustained. And the defendant is given until rule day of this court, in February, to file an amended answer herein, to which rulings the defendant at the time duly excepted and excepts.

JNO. A. WILLIAMS, *Judge.*

Indorsed: 390. Order. Filed Dec. 16, 1895. Geo. F. Sharitt, clerk, by J. F. Shearman, D. C.

37 In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

This cause comes on to be heard upon the exceptions of the plaintiff to the answer of the defendant and the motion of the defendant to take said exceptions from the files; so both questions may be disposed of together.

First, as to the exceptions to the answer. Many of the exceptions relate to matters contained in the answer which it is alleged have already been passed upon in disposing of the demurrer to the complaint in this cause. Another portion of the exceptions refers to matter in the answer which alleges that the plaintiff, and especially the City of Wichita, has a complete and adequate remedy at law. And other exceptions relate to that portion of the answer which alleges that there is a defect of parties defendant; that all other railroads conducting their business in the territory mentioned in the bill of complaint herein should be made parties defendant.

These three, especially the first two, matters were virtually raised and passed upon in deciding the demurrer to the original bill, and the court is of the opinion now that it is a matter of such public interest, and that the City of Wichita has no adequate remedy at law, so it may well be taken cognizance of by a court of equity. Many portions of the answer reiterate matters that were passed upon by the demurrer and need not be referred to with any particularity.

In regard to the defect of parties defendant, the court sees no reason why the Government should be compelled to make all of the railroads doing business in the territory described parties defendant for neither it nor the public may have any complaint against any others but the defendant in this action. But, whether there be complaint or not the court fails to see how the defendant here can require all roads to be made parties in an action brought against it by the Government for alleged violations of the interstate commerce law or for any of the matters complained of in the complaint herein.

The other exceptions relate to matters which the counsel for the Government contend are uncertain and argumentative and state conclusions of law and not matters of fact. The court is of the opinion that these exceptions are also well taken, for it is
38 apparent that the answer does not state conclusions of law and not matters of fact, and presents arguments instead of facts.

Another exception is to that portion of the answer which sets up that the basis for all freight rates is fixed at the Mississippi and Missouri rivers. Why this is done and by what authority and for what reason, public or otherwise, the answer fails to disclose. It seems to be fixed at the will of the defendant and other common carriers of freight and the assertions of the answer would indicate that, when so fixed and determined, neither the Government nor

any one else can be heard to complain. I am of the opinion that the exception to this part of the answer is well taken.

An order will be entered, sustaining all of the exceptions to the answer of the defendant filed herein, and consequently overruling the motion of the defendant to take said exception from the files.

JNO. A. WILLIAMS, *Judge.*

Indorsed: 390. Order. Filed Dec. 16, 1895. Geo. F. Sharitt, clerk. B. J. F. Shearman, D. C.

Entry on journal, March 11, 1896.

UNITED STATES, Compl't,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Def't. } No. 390.

It appearing that full argument was not had on the exceptions of the complainant to the answer of the defendant, on application of the defendant it is now ordered that the order heretofore entered sustaining said exceptions be and the same hereby is set aside and said exceptions set down for argument before Hon. John A. Williams, on a day to be by him designated.

CASSIUS G. FOSTER, *Judge.*

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

The Amended Answer of the Missouri Pacific Railway Company to the Bill of Complaint of the United States of America.

This defendant now, and at all times, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the errors or uncertainties or other imperfec-
39 tions in said bill of complaint contained, for answer thereto, or unto so much of such parts thereof as said defendant is advised is or are material for it to answer unto says, as follows:

I.

It admits that it is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and that it was at the time of the filing of said bill of complaint, and is now, a common carrier of all classes and kinds of freight commonly carried and transported by railroad companies between the city of St. Louis in the State of Missouri and the city of Omaha, in the State of Nebraska, and the city of Wichita in the State of Kansas, and points intermediate thereto, except as hereinafter more specifically set forth in paragraph 2 page 4 of this answer.

It admits that all shipments of freight between the city of St.

Louis and the city of Wichita, and all shipments of freight between the city of St. Louis and the city of Omaha over its lines pass over the same track between the city of St. Louis and the city of Holden, in the State of Missouri, as alleged in said bill of complaint.

II.

This defendant admits that it had at the time of the filing of this suit, and for some time prior thereto, maintained in force upon its lines of road, the tariffs and schedules of freight rates governing all freight traffic moved between said cities of Wichita, Omaha and St. Louis, by means of which it charged, demanded, collected and received, except as hereinafter particularly set forth in paragraph 2 on page 4 of this answer, compensation for the transportation of property and freight between said cities, and which said tariffs and schedules are properly set out in said bill of complaint;

But this defendant specifically and expressly denies the averments of said bill of complaint that said tariffs, rates, schedules and charges are unjust or unreasonable, excessive or exorbitant, or that they constitute an unjust and unreasonable discrimination against shippers, or that said tariff, rates and schedules, rules or regulations subject persons shipping between said city of Wichita and said city of St. Louis, or the localities of Wichita or St. Louis, to an undue or unreasonable prejudice or disadvantage, as charged in said bill of complaint, by reason of the fact that the charges made in pursuance of said tariff, rates, rules and regulations are in excess of the charges made by this defendant for like and contemporaneous service of transportation of property between said cities of Omaha and St. Louis under substantially similar circumstances and conditions.

40 But this defendant alleges the fact to be that the difference between the schedules, tariffs, rates and charges demanded and collected between said cities of St. Louis and Omaha, and said cities of St. Louis and Wichita *are* wholly owing to the fact that the conditions and circumstances are substantially dissimilar between the St. Louis-Omaha line and the said St. Louis-Wichita line, and *are* wholly governed by causes over which this defendant has no possible control.

And defendant specially denies that, as charged in said bill of complaint, but for the acts of this defendant complained of therein, the said city of Wichita would carry on a large and profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight, but alleges the fact to be that the trade, business, markets and transportation of each and all of the classes, classifications and kinds of freights are wholly governed by conditions of commerce, trade, market, business and transportation which exist and operate wholly independent of the aforesaid rates, rules, tariffs or regulations put into force by this defendant, or by means of which it charges, demands, collects or receives compensation therefor.

Further denying, and defending against the averments of said bill of complaint, this defendant says:

That there is great dissimilarity of circumstances and conditions in respect of:

(1.) The character and volume of business;

(2.) The cost of service;

(3.) The competition of many independent lines of railroad and water transportation;

(4.) By reason of many commercial advantages, geographical position and climatic conditions of the respective cities of Wichita and Omaha and their vicinities, together with other substantially dissimilar circumstances and conditions.

And to state the facts with greater particularity, this defendant says, with regard to:

First. The character and volume of business done over its aforesaid line or lines of road, that as to the articles of transportation included in the schedules set forth as aforesaid in complainant's bill of complaint, and being the articles constituting the greater bulk of the transportation and commerce of said city of Wichita and vicinity, they do not, and would not, in the due and actual course of business, and under the existing commercial conditions, compete in the St. Louis markets with the said city of Omaha or its locality or vicinity; and that said cities of Wichita and Omaha and
41 their localities or vicinities do not in any sense become competitors for any business between the said city of St. Louis and the said cities of Wichita and Omaha.

That owing to natural and actual controlling commercial conditions, more particularly hereinafter set forth, and independent of and uninfluenced by the rates complained of as fixed and enforced by this defendant, there is practically no business between the said city of Wichita and the said city of St. Louis in the transportation of agricultural products, live stock and the products of animals, and packing-house products generally, grain in bulk and coal;

Wherefore, this defendant, expressly denying that it by any mode or means discriminates in favor of said city of Omaha against said city of Wichita, or by any mode or means exercises undue preferences to the detriment and hindrance of commerce and trade between said cities and between said localities, or that it in any manner subjects the said localities of Wichita and St. Louis to any unreasonable and undue prejudice and disadvantage by reason of the alleged fact that the charges made in pursuance of said tariff rates, rules and regulations are in excess of the charges made by it for like and contemporaneous service for the transportation of property between the city of Omaha and the city of St. Louis under substantially similar circumstances and conditions, as it is alleged, alleges the fact to be that there is no possible relation of commerce, or of business, or competition, existing between the said cities of Omaha and Wichita upon which a charge either of discrimination or undue or unreasonable preference, prejudice or disadvantage may be predicated, but that upon the contrary there is little or no competition whatever between the two cities in any St. Louis market, or other market, wherein the rates between the said cities and the city of St. Louis are involved, and that the schedule or schedules referred to, and

the rates which this defendant so made or makes, between the cities of St. Louis and Omaha do not operate in any manner directly or indirectly to affect either the prosperity of the city of Wichita, the people interested in her municipal welfare, or the sale or prices of her products or commodities in any market or markets in the country.

This defendant further alleges the fact to be, with respect to the comparative volume of business, that there is and was at the time of the filing of said bill of complaint, a vast difference in the volume of freight moved and handled by and over defendant's line
42 or lines of road between said cities of St. Louis and Wichita, and St. Louis and Omaha, being the line or lines in question;

That of the products of the forest, products of animals, including live stock, agricultural products, manufactures and merchandise, and all classifications under the head of miscellaneous articles of freight, being the total of all kinds and classes of freight, including the schedules set forth and complained of in said complainants' bill inclusive, there was moved from St. Louis to Wichita, a sum total of 3,237,630 lbs. during the six months ending December 31st, 1893; and from St. Louis to Omaha, there was, of these products, a total sum of 48,326,305 lbs., or in favor of Omaha over Wichita a total of 45,088,675 lbs.

That during the same period of time there was of the same products handled by and moved over the same line or lines of defendant's road from Wichita to St. Louis the sum total of 1,528,180 lbs., and from Omaha to St. Louis, a sum total of 20,674,240, making a sum total of 19,146,060 lbs. in favor of Omaha and against Wichita;

That during the years 1894 and 1895 the proportion or ratio of the total tonnage of Omaha to Wichita has increased, especially for the year 1894.

That there is likewise a vast difference in the volume of freight forwarded from and received at Wichita and Omaha during the same period or periods of time;

That during the six months ending December 31st, 1893, there was moved from Wichita over defendant's line or lines of road to all points, of the same classifications of products and articles, a sum total of 12,052,910 lbs.; from Omaha to all points 117,582,258 lbs., leaving a balance in favor of Omaha over Wichita of 105,529,348 lbs.; and from all points to Wichita the sum total of 44,499,229 lbs., and from all points to Omaha a sum total of 431,939,348 lbs., or a total in favor of Omaha over Wichita of 387,440,119 lbs.

That during the year ending December 31st, 1894, the balance in favor of Omaha over Wichita on like classifications and shipments of freight was 675,661,978 lbs.; and for the year ending December 31st, 1895, a balance on like classifications and shipments of 626,207,761 lbs.; that Wichita exceeded Omaha in no article of freight, except bulk grain for the six months ending December 31st, 1893, and flour and grain in the year 1894, and flour and grain in the year 1895 from and to points, St. Louis excepted.

This defendant further avers and charges the fact to be that there

is a vast difference in volume of business and of tonnage and
43 of freight forwarded from St. Louis on that part of the line or lines described in complainant's bill of complaint as running from Holden to Omaha, and hereinafter denominated the Nebraska-Omaha extension, and that branch described as running from Holden and Kansas City to Wichita, and hereinafter denominated the Kansas-Wichita branch;

That that part of defendant's line or lines described in complainant's bill, and extending from Holden, Missouri, or near Holden, to Omaha, is a part of what is known as the main line of the Missouri Pacific Railway system;

That upon all parts of the main line, and especially that part of it described, the traffic and business is and has been for years greatly in excess of the traffic and business on its branch lines, and especially on the branch line described in said bill as running from Holden, Missouri, to the city of Wichita;

Also that on that part of the main line so described running from Atchison, Kansas, to Omaha, hereinafter referred to as the Nebraska-Omaha extension, together with the branch lines, being known as the Lincoln and Crete branches, Nebraska City and Omaha Southern lines or branches, the number of tons forwarded from stations to Omaha was as follows:

During the year 1893 ..... 520,280 tons.
During the year 1894 ..... 474,786 tons.
During the year 1895 ..... 306,780 tons.

That the number of tons forwarded from stations on what is called the Fort Scott, Wichita & Western division, Fort Scott to Kiowa, including the McPherson branch, and being all that portion of defendant's line described in said bill of complaint, was as follows:

During the year 1893 ..... 138,856 tons.
During the year 1894 ..... 110,222 tons.
During the year 1895 ..... 87,630 tons.

Leaving in favor of the Omaha extension as against the Wichita branch, a sum total of:

During the year 1893 ..... 381,424 tons.
During the year 1894 ..... 364,564 tons.
During the year 1895 ..... 219,150 tons.

That the number of tons received at stations on the Nebraska-Omaha extension for the city of Omaha was as follows:

During the year 1893 ..... 737,501 tons.
During the year 1894 ..... 583,302 tons.
During the year 1895 ..... 528,247 tons.

44 That the number of tons received on the Kansas-Wichita branch for the city of Wichita was as follows:

During the year 1893 ..... 145,340 tons.
During the year 1894 ..... 117,373 tons.
During the year 1895 ..... 122,126 tons.

Showing a sum total in favor of the Nebraska-Omaha extension against the Kansas-Wichita branch of:

During the year 1893 ..... 592,161 tons.
During the year 1894 ..... 465,929 tons.
During the year 1895 ..... 406,121 tons.

That the total tons handled over the Nebraska-Omaha extension as per above *was:*

During the year 1893 ..... 1,257,781 tons.
During the year 1894 ..... 1,058,088 tons.
During the year 1895 ..... 835,027 tons.

And the total tons handled over the Kansas-Wichita branch *was:*

During the year 1893 ..... 286,196 tons.
During the year 1894 ..... 227,595 tons.
During the year 1895 ..... 209,756 tons.

Leaving a total in favor of the Nebraska-Omaha extension over the Kansas-Wichita branch of:

During the year 1893 ..... 973,585 tons.
During the year 1894 ..... 830,483 tons.
During the year 1895 ..... 625,271 tons.

That the volume of Nebraska-Omaha Extension business for the year 1893 as compared with the Kansas-Wichita Branch business shows 442.6 per cent.;

That the volume of Kansas-Wichita Branch business for the year 1893 as compared with the Nebraska-Omaha Extension business shows only 22.6 per cent.;

That in the years 1894 and 1895 the ratio was substantially the same;

That the volume of business on that part of defendant's line or lines described in said bill of complaint as running from Holden to Omaha which extends from Holden to the city of Atchison, is greatly in excess of that part from Atchison to Omaha, being as nearly as can be approximated, at least 33⅓ per cent. over the Nebraska-Omaha extension on all classifications of freight, and that the mileage upon which the foregoing table is based is greater from Holden to Wichita than from Atchison to Omaha.

Second. That as to cost of service:

45 This defendant for greater particularity, states that the average earnings per ton on the Missouri Pacific main line, including the line to Omaha in question, were:

During the year 1893..... $1.37 44-100
During the year 1894..... 1.46 36-100
During the year 1895..... 1.46 87-100

The average expense per ton on the same was:

During the year 1893..... 1.15 61-100
During the year 1894..... 1.21.78-100
During the year 1895..... 1.23 56-100

The average net earnings per ton on the same were:

During the year 1893	.21 83-100
During the year 1894	.24 58-100
During the year 1895	.23 31-100

That the average earnings per ton on the Kansas-Wichita branch or branches in question in this suit were:

During the year 1893	1.08 76-100
During the year 1894	1.12 54-100
During the year 1895	1.18 71-100

That the average expenses per ton on the same were:

During the year 1893	$1.34 24-100
During the year 1894	1.36 17-100
During the year 1895	1.41 41-100

That the average net loss per ton on the same was:

During the year 1893	.25 48-100
During the year 1894	.23 63-100
During the year 1895	.22 70-100

That the average earnings per ton per mile on the main line of the Missouri Pacific railway, including the line to Omaha and in question in this suit, were:

During the year 1893	0.00 85-100
During the year 1894	0.00 92-100
During the year 1895	0.00 99-100

That the average expense per ton per mile on the same was:

During the year 1893	0.00 72-100
During the year 1894	0.00 76-100
During the year 1895	0.00 83-100

That the average net earnings per ton per mile on the same were:

During the year 1893	0.00 13-100
During the year 1894	0.00 16-100
During the year 1895	0.00 16-100

46 But that the average earnings per ton per mile on the Kansas-Wichita branch line or lines in question in this suit were:

During the year 1893	0.01 02-100
During the year 1894	0.01 10-100
During the year 1895	0.01 10-100

That the average expense per ton per mile on the same was:

During the year 1893	0.01 25-100
During the year 1894	0.01 33-100
During the year 1895	0.01 36-100

That the average loss per ton per mile on same was:

During the year 1893	0.00 23-100
During the year 1894	0.00 23-100
During the year 1895	0.00 26-100

That the difference in the aforesaid net earnings and expenses on the aforesaid line or lines of road is further augmented by the following facts, circumstances and conditions:

(1.) That on the Nebraska-Omaha extension cars for Omaha are loaded on an average of about 17 per cent. heavier than those for Wichita on said Kansas-Wichita branch, and at least 25 per cent. heavier on that part of the main line between Holden and Atchison.

(2.) The volume of business done and the fact that the net expense of service in moving shipments is reduced in the ratio of the volume and tonnage of the business done.

(3.) That on the main line and Nebraska-Omaha extension a larger per cent. of the shipments are in car-load lots and handled by the shipper himself, whereas on the Kansas-Wichita Branch line or lines there is a larger per cent. of less than car-load shipments which in all cases must be handled by the carrier.

(4.) That by reason of the foregoing the labor and expense of consequent additional switching and handling of cars at stations on the Kansas-Wichita branch is necessarily incurred, thereby increasing the cost of service to the defendant and requiring corresponding increase in the cost of carriage to the shipper.

Also on the Kansas-Wichita business the volume is such that it is necessarily handled in local trains, whereas on the main line and Nebraska-Omaha extension the volume and character of the shipments enable the defendant to handle the business in through trains, thus obviating the time, labor and expense of frequent handling.

47 (5.) The local business from the numerous large towns on the main line and the line described in complainants' bill, being the Omaha extension, is greatly in excess of the business of the Kansas-Wichita Branch line or lines.

(6.) There are also advantages on the main line and the Nebraska-Omaha extension thereof in favor of that line in the number of what are known as deliveries of freight to connecting lines, there being a great many more connections with other lines favorable to connecting deliveries than on the Kansas-Wichita line or lines.

(7.) That the maximum and length of grades in a line of road of the length of the Kansas-Wichita branch directly affects the cost of transportation, the cost of service being in the ratio of the maximum of grade.

That the maximum on said branch is 1.70 % based on a minimum of 0.78 %, and a total of 364,720 lineal feet, as shown by the table hereto attached, marked Exhibit "A" and made part of this answer.

That the maximum on the Nebraska-Omaha extension is 1.26 % based on the same minimum, and a total of 179,800 lineal feet, as shown by the table hereto attached, marked Exhibit "B" and made

a part of this answer; and that the maximum on that part of the main line from Holden to Atchison is still less than on the Nebraska-Omaha extension from Atchison.

This defendant charges and alleges the fact to be that the rates, charges and schedules on the aforesaid Nebraska-Omaha extension from Holden to Omaha are not only reasonable and just to the shipper and the public at large, but are in respect of revenue to the company unjustly and unreasonably reduced so that they are in fact, as hereinbefore alleged, not fairly compensatory for the service rendered.

That as to the Kansas-Wichita Branch line, and being that part of the line from the main line at Pleasant Hill near Holden to Wichita, a reduction of said rates, charges and schedules, and the establishment of a permanently reduced rate and schedule, would be oppressively unjust and unreasonable and could not be adopted and put into effect by it without serious and irreparable injury to and destruction of the property, rights and interests of the owner thereof and the owners and holders of its first and second mortgage bonds and stock, as more fully hereinafter appears.

That the length of the aforesaid branch line of road is 234 miles.

48 That there is a first mortgage and bonded indebtedness upon said line of road at the rate and amount of $15,000 a mile.

That there is a second mortgage and bonded indebtedness on that part of said line known as the Fort Scott and Wichita division, and being that part of the line between Fort Scott and Wichita, of approximately the sum and amount of $3,000 per mile.

That there is issued for each and every mile of said branch line approximately the sum and amount of $16,000 of capital stock on the whole of said branch line.

That said first-mortgage bonds bear interest at the rate and amount of 5 % per annum; and that said second-mortgage bonds bear interest at the rate and amount of 6 % per annum, payable semi-annually.

That said branch line so described as the Kansas-Wichita line extends not only to Wichita, but in a southwesterly direction from there to Kiowa, Kansas, a distance of 87 miles; and from El Dorado, Kansas, it extends in a northwesterly direction to McPherson, Kansas, a distance of 62 miles.

That this line together with these extensions, is operated by this defendant, and has been for a number of years.

That a like mortgage incumbrance and issue of stock has been made upon said extensions, and at the same time.

That the expense of operation, tonnage, volume of business and earnings are even less per mile on said extensions than on the line to Wichita, and the expenses of operation ratably increased as the line or lines proceed westerly.

That there is no adequate advantage to the owner or owners of said bonds and stock, or the operator of said branch line, by reason of any connections which it may have with any other line or lines

of defendant or other company, or as a feeder, to compensate for any reduction of rates or charges whatever, or in any measure justifying any reduction.

That the said bonds and stock were issued for and represent value; and that the existing rates and schedules were not sufficient to enable the owner or operator of said property to pay all the interest on said bonds.

That at no time have the holders of said stock been able to collect or receive any dividends thereon, but upon the contrary the owners of said property and said bonds and stock have been forced
49 to advance large sums of money for the purpose of providing in part for the interest and the operation of said road for which they have not been reimbursed.

That there *has* been necessarily expended in cash in the construction and equipment of said line of road approximately $40,000 per mile; and that the same could not be replaced for less than approximately $30,000 per mile, and that the earnings of said road are not sufficient to provide for its necessary operation, betterments and maintenance;

That at all times the services of its officers and employés have been procured as cheaply as practicable, and no more employed than necessary, and at fair and reasonable rates of compensation, and that in every respect said property has been operated and maintained at the lowest possible cost.

Wherefore, and upon all the grounds, and for all the reasons above set forth, and upon all the facts, this defendant alleges that each and all of the rates, charges, schedules and classifications enforced by it at the time complained of were in no case unreasonable or unjust; that they were not in restraint of a free, fair and unprejudiced movement of all commodities affected thereby; that the same were not, and are not, sufficient to enable this company to pay the charges of operation, maintenance, betterments, taxes, and interest, as aforesaid; and that if it should be compelled to reduce its revenues by a material reduction of its rates and schedules as prayed for in said bill, or to meet the rates and schedules necessarily in force under the dissimilar circumstances and conditions hereinbefore described as obtaining upon the Nebraska-Omaha line, and the Omaha-St. Louis business, and that of intermediate points, its revenues would be so reduced and diminished as to entail upon it unavoidable bankruptcy, and prevent the maintenance of the property in proper order and good working condition so that the traffic and business of the road and every part thereof would at all times be done with safety and expedition, and that the enforcement of such diminished rates would be in effect a confiscation and appropriation to the use of others of said property, or at least of a portion of the capital invested by its owners, and by said stock and bondholders, and the taking of the same without due process of law and without adequate compensation being made therefor; would operate to deny to the owners of said property and those who have invested their means as aforesaid the equal protection of the laws, and would be contrary to and in viola-

tion of the constitution and laws of the State of Kansas and of the United States.

50 Third. As to the competition of many independent lines of road, and of water transportation, this defendant, for further particularity of fact, further says:

The relative rates between the said cities of St. Louis and Omaha, and the said cities of St. Louis and Wichita, are further controlled by the further following facts, circumstances and conditions, to wit:

The Mississippi river is the basing line for all rates for territory lying west thereof between it and the Missouri river, and the Missouri river is the basing line of all rates between it and Wichita;

That the rating of all shipments of freight originating in the middle and eastern States having destination in the States of Iowa and Nebraska and other trans-Mississippi territory is found by adding the rate from point of origin to the Mississippi river, and the rate from the Mississippi river to the point of destination.

That the rates to the cities located on the Mississippi river, from Clinton, Iowa, on the north, to St. Louis on the south, both inclusive, on business from the manufacturing and other industrial districts in the middle and eastern States destined to the Missouri river, are alike to all, and this defendant has no part in making the same.

That all the Mississippi River cities located within these limitations are entitled by location and otherwise to compete, and do compete, for the trade of the cities located on and west of the Missouri river, Omaha to Kansas City inclusive, so that the rate to any one of them must of necessity be no higher than those governing from any of the others in order to permit shipment to them of products and freight from the east, and reshipment thence to the consuming territory; and this defendant has no power to prevent or change this condition.

That the measure of the rate charged from such Mississippi River crossings to Omaha is the schedule and rate maintained by the short lines from the principal Mississippi River crossings across the State of Iowa to Omaha;

That the distance of some of these, for instance, from Burlington to Council Bluffs, Iowa, via the C. B. & Q. R. R. is but 293 miles; from Davenport, via the Rock Island railway 316 miles; from Clinton, Iowa, via C. & N. W. R. R. 350 miles;

That the distance from St. Louis to Omaha, via the Wabash railroad, which is the short line, is only 280 miles, which line, by

51 reason of being the short line, absolutely controls the tariff between the said cities of St. Louis and Omaha; and this defendant is powerless to alter or prevent it;

That the Missouri Pacific railway from St. Louis to Omaha runs through an agricultural territory and serves many important business centers, as, for instance, Jefferson City, Sedalia, Kansas City, Atchison and St. Joseph;

That owing to the large amount of local business of all kinds, and the further fact that the service for the local business is utilized for the through business, the train service having to be maintained for the local business, the compensation for the total through business

and local business is barely compensatory upon the basis of the aforesaid schedules, as shown by the foregoing tables;

That this defendant is compelled to take and do business at the rate of such schedules or withdraw from that territory;

That such withdrawal would simply result in lifting the Missouri Pacific railway out of such traffic without accomplishing any corresponding benefit to the city of Wichita or to the public in general;

That these are conditions, circumstances and environments entirely beyond the control of this defendant, and are conditions that do not exist as to the city of Wichita, or Wichita business, either from St. Louis or the eastern seaboard;

That as between the said cities of Omaha and Wichita there is the further differences that the Missouri river is what is known as a "basing line" which extends from all Missouri River points to Kansas City, and thence southerly through the cities of Fort Scott, Kansas, and Joplin, Missouri; and this defendant had nor has not any part in making it such;

That the city of Wichita lies about — miles from what is known as "the Missouri River basing line;"

That tariff at the Missouri River basing line is influenced largely, not only by volume of business, competition, cost of transportation and other elements affecting the rates, but also by the fact that the Missouri river is in fact in a measure, and potentially in a much larger measure, favored by water transportation;

That all these conditions are recognized by the Board of Interstate Commerce Commission, and the courts, and by shippers and carriers universally as legitimate controlling factors of traffic and commerce in the Mississippi and Missouri River valleys;

52 That the city of Omaha is likewise affected by the same condition, being located upon the Missouri river;

That the rates west of the Missouri River crossings and "the Missouri River basing line," extended as aforesaid, and the city of Wichita, are necessarily still further augmented by the following conditions, to wit:

The following lines of railway run into and through the city of Wichita, and did so run at the time of filing said bill of complaint:

The Missouri Pacific railway, over the Kansas & Colorado Pacific railway;

The Atchison, Topeka and Santa Fe railway;

The St. Louis and San Francisco railway; and

The Chicago, Rock Island & Pacific railway;

That all of these lines are branch lines except the St. Louis and San Francisco, and the Chicago, Rock Island & Pacific railroads, which former road is now, and was at the time of the filing of said bill of complaint, controlled and operated by the Atchison, Topeka & Santa Fe Railroad Company;

That of these, only two, the Missouri Pacific and the St. Louis and San Francisco railroads run between the cities of Wichita and St. Louis;

That of these only the Missouri Pacific and the Chicago, Rock

Island & Pacific railway connect with both the city of Omaha and the city of Wichita.

Fourth. That as to commercial advantages, geographical position, climatic conditions of the respective cities of Wichita and Omaha, together with other like substantially dissimilar conditions and circumstances, this defendant, for greater particularity, further says:

That the intermediate towns between the Missouri river and the city of Wichita are generally much less numerous and of much less commercial importance than upon the line between St. Louis and Omaha; that the country is much more sparsely settled; that while the country in the region of Wichita, and for a large part of the distance between the Missouri river and Wichita, is wholly an agricultural country, without any mineral resources whatever, the crops, especially in the vicinity of Wichita, and the country tributary thereto, have been exceedingly uncertain and precarious; that the fuel consumed in the operation of defendant's line of railway between the eastern line of the State of Kansas and the city of Wichita has to be hauled onto its lines at great expense, and that owing
53 to the reduced and restricted volume of business it is necessary to handle much of the freight both in and out in less than car-load and less than train-load lots, thus greatly increasing the expenses of service; that these unfavorable conditions do not as a rule obtain with reference to the city of Omaha; that the population of the city of Wichita is probably only about half the population of the city of Omaha; that the said city of Wichita has not so many through main lines of railroad as the city of Omaha; that said city of Omaha is located upon the Missouri river, potentially navigable, if not in fact, in the center of a large agricultural area and convenient to coal and other fuels, but that the city of Wichita is a long distance from any navigable stream, potential, or in fact; often with insufficient water supply, and insufficient and deficient fuel and timber supply for train service; that the said city of Omaha has, as this defendant is informed and believes, large and flourishing stock yards and packing-houses, but the packing-houses and stock yards of the city of Wichita have, not by reason of the alleged discriminations, as charged, but, as this defendant is informed and believes, by reason of the recent repeated and continued failure of crops almost if not quite suspended operation; that many other dissimilar conditions and circumstances exist; that these are conditions and environments entirely beyond the control of this defendant; that the circumstances and conditions, therefore, under which the Omaha-Wichita freight rates are handled are not substantially similar, but substantially and wholly dissimilar.

This defendant, further denying, as alleged in said bill of complaint, that but for the acts complained of, the said city of Wichita would carry on a large and profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight, and that said defendant's railroad between said cities of St. Louis and Wichita with its western and southern connections with other roads at the city of Wichita, would, but for such fact, constitute one of the principal thoroughfares in freight traffic between the Mississippi

river and the Pacific ocean, and between the Mississippi river and the gulf of Mexico at the city of Galveston, alleges the fact to be that its line of railroad from the city of St. Louis to the city of Wichita has no direct, through or continuous line or connection, and no direct operation between the Mississippi river and the western seaboard, or Pacific coast, or the gulf of Mexico, or the city of Galveston, either over its own lines or over the lines of other roads, so as to be able to control, fix or make through tariffs, and that its own lines of road running to the city of Wichita end at the town of Kiowa, on the southwest, and the town of Kanopolis on the northwest;

54 And this defendant, further expressly denying that by reason of any unjust or excessive charge for freights, or any unreasonable or unjust preferences or discriminations, as charged in said bill of complaint, the said city of Wichita has been limited or restricted as a distributing point for central and southern Kansas, or the Indian Territory or Oklahoma, or that it has by virtue of said schedules prevented it from furnishing, as alleged, an extensive market with freight of all classifications, or limited or restricted the use or usefulness of its stock yards, or its shipments of live stock, as alleged in said bill of complaint, alleges the fact to be that if it has been restricted, as this defendant does not doubt that it has, as a general distributing point for either southern Kansas, or the Indian Territory, or Oklahoma, or all of these, or as a market for freight of any kind, or if the stock yards located at said city of Wichita have not done the business which they may have done in former and more prosperous times, these conditions are not attributable to any charges or schedules which it makes either to or from Wichita, or to or from said city of Omaha, as it is alleged, but altogether to conditions, causes, influences and environments over which this defendant has no control, and which inhere wholly in location, climate, market, distance, cost of service, competition, volume of trade, and other environments hereinbefore set out for which this defendant is in no manner responsible.

And this defendant further expressly denies that the schedules or rates complained of in said bill of complaint are in any manner detrimental to commerce or trade, or in any way directly or indirectly hinder commerce or trade to the injury of the localities or the municipalities in question, or the public at large, or the people of the United States, or the United States of America.

III.

Defendant further avers and shows that no complaint has ever been filed with the Interstate Commerce Commission of anything done or omitted to be done by defendant company in respect of said schedules in contravention of the provisions of the interstate-commerce act, and as required by law;

That no such complaint has ever been by said commission forwarded or presented to this defendant, or demand made upon it for reparation for any alleged injury as required by law;

That the Interstate Commerce Commission never as matter of fact investigated such, or any, complaint, or the alleged question at

issue between this defendant and the city of Wichita, in fact, or as required by law;

55 That said commission has never made an order, recommendation, report or finding upon the issues between the complainants and this defendant, as required by law;

That it never was in fact made to appear to the satisfaction of the commission that anything had been done or omitted in violation of the act or of any law cognizable by the commission, or that any injury had ever been sustained by the complainants, as required by law;

That no notice was given to cease or desist from any alleged violation, or to make reparation for any alleged injury within any time named by the commission, or any opportunity given this defendant to make reparation for any alleged injury within any time named by the commission, as required by law;

That this defendant never violated or refused or neglected to obey or perform any lawful order or requirement of the commission, or of any court, relating thereto;

That the schedules complained of in the bill of complaint herein have been lawfully made, published and approved by the Interstate Commerce Commission, as required by law;

That said commission has never, agreeably to the provisions of the law in that regard, duly caused a properly authenticated copy of any report in respect of the matters at issue in said complaint, together with any order or notice aforesaid, to be delivered to this defendant;

That such schedule had been for years prior thereto, and was at the time of the filing of said bill of complaint, in full legal force and effect unimpeached by the commission, or by any court, and that no charge had ever been made or proven that it was illegal or unjust or discriminatory in its character;

That no order has ever been made by the commission in relation thereto, as required by law.

Wherefore, and by reason of the aforesaid matters and things, this defendant is advised by counsel and therefore avers, that the act under which and upon which it is alleged in said bill of complaint this suit is founded, does not authorize or empower the commission or the Attorney General of the United States, or the United States attorney for the district of Kansas, to institute this suit.

And this defendant is advised by counsel and therefore avers that neither by virtue of said act nor any other right or power has this court jurisdiction, nor can it draw unto itself jurisdiction under the facts and circumstances presented by said bill of complaint and the issues hereby joined to hear and determine this suit.

56 IV.

This defendant is advised by counsel and therefore avers that the United States of America has no just cause of complaint against this defendant;

That this defendant has never either directly or indirectly, by making or enforcing the schedules complained of in this bill of com-

plaint, done injury to either the United States of America or any officer thereof, nor to the public at large; and that the United States of America, having no just cause of action or of complaint either at law or in equity against this defendant by reason of making or enforcing the schedules, tariffs and rates charged in said bill of complaint, is unduly and unjustly harassing and oppressing this defendant in an illegal and unjustifiable prosecution of this suit.

V.

Defendant further alleges and charges the fact to be that the issues involved in this suit cannot be fairly determined for the reason that the railway companies who are responsible for the rates and schedules in question are not parties hereto and should be made parties in order to a full and complete determination of the issues;

That the following-named carriers are responsible for the rates to Wichita from the Mississippi and Missouri River crossings:

The Chicago, Rock Island & Pacific Railway Company;
The Atchison, Topeka & Santa Fe Railway Company;
The St. Louis & San Francisco Railway Company.

And inasmuch as any change in the rates to Wichita will seriously and generally affect the rates of freight all over the State of Kansas, all other lines interested in traffic to and from the State of Kansas should necessarily become parties to this suit, viz.:

The Missouri, Kansas & Texas Railway Company;
The Kansas City, Fort Scott & Memphis Railway Company;
The Union Pacific Railroad Company;
The St. Joseph & Grand Island Railway Company;
The Kansas City Northwestern Railway Company;
The Burlington & Missouri River Railroad Company;
The Hutchinson & Southern Railroad Company;
The Kansas City, Pittsburg & Gulf Railway Company.

And inasmuch as the final determination of this suit is likely to affect the rates between the cities of Omaha and St. Louis, and inasmuch as the lines running between the Mississippi River
57 crossings between Clinton, Iowa and St. Louis and Omaha, inclusive, and the city of Omaha, make and control the rates, tariffs and schedules on all classifications of freight between the city of St. Louis and the city of Omaha over defendant's lines of railway and it is powerless to make or reduce the rates such lines are indispensable parties to the complete and final determination of the rates involved, and should be made parties to this suit. They are:

The Wabash Railroad Company.
The St. Louis, Keokuk & Northwestern Railway Company.
The Burlington & Missouri River Railroad in Nebraska.
The Chicago, Burlington & Quincy Railway Company.
The Illinois Central Railway Company.
The Chicago, Milwaukee & St. Paul Railway Company.
The Chicago & Northwestern Railway Company.
The Fremont & Elkhorn Valley Railroad Company.
The Chicago, St. Paul, Minneapolis & Omaha Railway Company.

The Chicago & Great Western Railway Company.
The Chicago & Alton Railway Company.

Wherefore this defendant asks and prays this honorable court to make an order of intervention requiring the complainants herein to make all of said railway and railroad companies codefendants to this suit, and avers that each and all of such parties and companies are indispensable, as the radical change involved, or, indeed, any change, would not only seriously affect and upset rates in all said territory, but likewise seriously affect shippers, and shipping interests, in all said territory.

VI.

This defendant specially and expressly denies that the wrongs herein complained of are remediless in the premises at law or only relievable in a court of equity, and under the form of procedure instituted, but alleges the fact to be that the real party in interest, to wit: the municipality and locality of Wichita, together with any and all other persons or parties having any pretended or just cause of action against this defendant, and as well, also, the complainants, The United States of America, have under and by virtue of the provisions of the aforesaid interstate-commerce act, and in the courts of the State of Kansas, easy, adequate and complete remedies at law for every possible form of excessive charge, discrimination or undue preference, and for the correction or amendment of any alleged unlawful or oppressive schedule, rate or tariff.

58 And this defendant is advised by counsel and avers the fact to be that under the law in such cases made and provided and applicable to proceedings for the prevention of unreasonable charges or unlawful discrimination or undue preference, this court is without jurisdiction to hear and determine this cause without the same having first been submitted to and passed upon by the Board of Interstate Commerce Commission as specifically provided by the terms of said act.

Wherefore this defendant, having fully answered to said bill of complaint in so far as it is advised the same is material and necessary to be answered unto, denies that the said complainant is entitled to the relief, or any part thereof, in said bill of complaint demanded, or any relief whatsoever; prays the same advantage of its aforesaid amended answer as if it had pleaded and demurred to said bill of complaint, and prays to be hence dismissed with its most reasonable charges in this behalf most wrongfully sustained.

THE MISSOURI PACIFIC RAILWAY
COMPANY, *Defendant*,
By B. P. WAGGENER,
C. E. BENTON,
J. H. RICHARDS, *Its Solicitors*.

THE UNITED STATES OF AMERICA, }
Second Division for the District of Kansas. }

On this 16th day of January, 1897, before me, the undersigned, a notary public, at Fort Scott, Kansas, appeared the within-named J. H. Richards, and made oath:

That he is the general attorney of the defendant, The Missouri Pacific Railway Company, and vice-president of the main line of road in question within the State of Kansas.

That he signed the said amended answer as such officer by authority of the said company.

That he has read the same and knows the contents thereof, and the matters stated therein as of his own knowledge are true, and as to the matters stated upon the information of others he believes to be true.

J. H. RICHARDS.

Subscribed and sworn to before me this 16th day of January, 1897.

[SEAL.] GEO. O. BACON,
Notary Public, Bourbon County, Kansas.

My commission expires Aug. 6, 1899.

59 EXHIBIT "A."

Kansas City to Wichita via Pleasant Hill, Rich Hill, & Ft. Scott. Statement of grades exceeding 0.78%. Maximum grade, 1.70%.

Gradient.	Length.	Location.
1.70%	1200 ft.	East of crossing of Robinson creek, Ft. S. W. & W. r'y.
1.56% grade.	1000 "	1¼ mile south of Independence, main line Mo. Pac. r'y.
1.50% grade.	1200 "	¼ mile west of Ft. Scott shop grounds, Ft. S. W. & W. r'y.
	100 "	In N. W. ¼ sec. 28, twp. 25 S., range 24 E., Ft. S. W. & W. r'y.
	1100 "	In N. ½ of sec. 29, twp. 25 S., range 24 E., Ft. S. W. & W. r'y.
	1000 "	1 mile west or Marmaton station, Ft. S. W. & W.
Total.....	3400 lin. ft. of 1.50% grade.	
1.49% grade.	1700 ft.	1 mile south of Marmaton Creek crossing, Ft. S. W. & W. r'y.
1.45% grade.	2000 "	1 mile west of Uniontown, Ft. S. W. & W. r'y.
	6000 "	East of Yates Center, Ft. S. W. & W. r'y.
Total	8000 lin. ft. of 1.45% grade.	
1.40% grade.	800 " "	East of Iola, Ft. S. W. & W. r'y.
1.39% grade.	1300 " "	In S. W. ¼ of sec. 32, twp. 24 S., range 21 E., Ft. S. W. & W. r'y.
1.38% grade.	1300 lin. ft.	2000 ft. south of Springs sta., Mo. Pac. main line.
1.36% grade.	3900 " "	North of Springs sta., Mo. Pac. main line.
1.35% grade.	4400 ft.	1 mile south of Springs sta., Mo. Pac. main line.
	850 "	1¼ mile north of Butla sta., Lex. & Sou. div.
Total	5250 lin. ft. of 1.35% grade.	

1.34% grade.	3800 " "	4 miles south of Independence, Mo. Pac. main line.
1.32% grade.	2100 ft.	South of Springs sta., Mo. Pac. main line.
	900 "	1¼ mile south of Adrian sta., Lex. & Sou.
	300 "	South of Ovid sta., Lex. & Sou. div.
	1030 "	2½ miles east of Uniontown, Ft. S. W. & W. r'y.
Total....	4330 lin. ft. of 1.32% grade.	

Gradient.	Length.	Location.
1.30% grade.	5300 ft.	4½ miles south of Independence, Mo. Pac. main line.
	600 "	4¾ miles west of Ft. S. W. & W. r'y.
	700 "	¼ mile west of Uniontown, Ft. S. W. & W. r'y.
	1900 "	In S. W. ¼ of sec. 33, twp. 24 S., range 21 E., Ft. S. W. & W. r'y.
	1400 "	In S. ½ of sec. 32, twp. 24 S., range 21 E., Ft. S. W. & W. r'y.
	2600 "	8¾ miles west of Fall River crossing, Ft. S. W. & W. r'y.
	1500 "	9½ miles west of Fall River crossing, Ft. S. W. & W. r'y.
	300 "	9¾ miles west of Fall River crossing, Ft. S. W. & W. r'y.
	3500 "	10¾ miles west of Fall River crossing, Ft. S. W. & W. r'y.
	4500 "	In E. ½ and N. W. ¼ of sec. 12, twp. 26 S., range 8 E., Ft. S. W. & W. r'y.
	1300 "	In E. ½ of N. W. ¼, sec. 2, twp. 26 S., range 8 E., Ft. S. W. & W. r'y.
	7600 "	In N. ½ of sec. 4, and N. E. ¼ of sec. 5, twp. 26 S., range 8 E., Ft. S. W. & W. r'y.
Total....	31,200 lin. ft. of 1.30% grade.	

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1.28% grade.	1700 lin. ft.	1¼ mile east of Moran, Ft. S. W. & W. r'y.
1.25% grade.	4400 ft.	1½ mile north of Little Blue station, Mo. Pac. main line.
	800 "	1½ miles south of Bone Fork Creek crossing, Lex. & Sou. div.
	1500 "	South of Wild Cat Branch crossing, Lex. & Sou. div.
	2300 "	N. E. ¼ of sec. 27, twp. 25 S., range 24 E., Ft. S. W. & W. r'y.
	100 "	West of Uniontown, Ft. S. W. & W. r'y.
	2800 "	1¼ mile west of Bronson, Ft. S. W. & W. r'y.
	1300 "	East of La Harpe, Ft. S. W. & W. r'y.
	1400 "	1¼ mile west of La Harpe, Ft. S. W. & W.
	1100 "	2½ miles " " " "
	5200 "	In N. ½ of sec. 3, and E. ½ of N. E. ¼ sec. 4, twp. 26 S., range 8 E., Ft. S. W. & W.
Total....	20,900 lin. ft. of 1.25% grade.	

Grades between 0.78% and 1.25%, total lin. ft. 364,720 ft.

EXHIBIT "B."

Mo. Pac. main line, Kansas City to Omaha. Statement of grades exceeding 0.78%. Maximum grade, 1.26%.

Gradient.	Length.	Location.
1.26% grades.	500 ft.	North of Portal station.
	1600 "	1 mile north of Portal station.
	1100 "	1¼ mile north of Portal station.
Total....	3200 "	

1.25% grades.	10400 ft.	Between M. P., 332 and 334.
	2800 "	East of " 339.
	1600 "	West of " 334.
	1200 "	East of " 345.
	4800 "	Between " 345 and 346.
	2000 "	Both sides of M. P., 364.
	1300 "	¼ mile north of M. P., 444.
	3800 "	Both sides of M. P., 446.
	900 "	Both sides of M. P., 448.
	2200 "	From point 600 ft. north of M. P., 448.
	12100 "	Between M. P., 450 and 453.
	1600 "	Both sides of M. P., 454.
	10000 "	Between M. P., 456 and 458.
	1100 "	North of line between Douglas and Sarpy Co's.
	1900 "	West of Milins Road crossing.
	1100 "	West of B. & M. R. R. crossing.
	2200 "	Between Leavenworth St. crossing and stock-yard ext., H. B.
	1900 "	Opposite Popleton Park add. to Omaha.
	900 "	Both sides of Walnut Hill station.
	1500 "	North of Military road overhead crossing, Omaha.
	1300 "	In Hitchcock's 1st add. to Omaha.
	400 "	North of Kendall St., Omaha.
	600 "	Both sides of Emmet St., Bedford place, Omaha.
	1800 "	Both sides of Druid Hill station.
	69,400 ft.	

Grades between 0.78 and 1.25; total linear ft. 179,800 ft.

Indorsed: 390. The United States of America *vs.* The Missouri Pacific Railway Company. Amended answer of The Missouri Pacific Railway Company, defendant. Filed Jan. 18, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

61 In the Circuit Court of the United States in and for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainants,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

The Replication of The United States of America, Complainants, to the Answer of The Missouri Pacific Railway Company, Defendant.

Replicants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the answer of the said defendant is uncertain, evasive, and insufficient in law to be replied unto by this replicant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed, or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove, as this honorable court shall

direct, and humbly prays as in and by their said bill they have already prayed.

W. C. PERRY,
Solicitor for Complainants.

MORRIS CLIGGETT,
Of Counsel.

Indorsed: 390. The United States of America *vs.* The Missouri Pacific Railway Company. Replication. Filed Jan. 20, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

UNITED STATES OF AMERICA
vs.
THE MISSOURI PACIFIC RAILWAY CO. } No. 390.

Order.

For good cause shown it is now here ordered that the time of both parties to take testimony be and hereby is extended to and including June 10, 1897.

JNO. A. WILLIAMS, *Judge.*

Indorsed: No. 390. United States *vs.* Mo. Pac. R'y Co. Order extending time of parties to take testimony. Filed Mar. 8, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

62 In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainants,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

Stipulation.

Whereas, after joining issue upon the pleadings heretofore filed in the above-entitled suit, to wit: the original bill of complaint, the demurrer thereto, the original answer, the amended answer and the replication thereto, it has been determined by all of the parties to, and all of the parties interested in, said suit that it is desirable and best that the questions of law arising upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the circuit court of appeals of the United States and the Supreme Court of the United States;

Now therefore, it is hereby agreed and stipulated by and between the above-named complainants, by their solicitors, W. C. Perry and M. Cliggitt, and the above-named defendant, by its solicitors, J. H. Richards and C. E. Benton, that said complainants shall file an amended bill of complaint in said suit, to which said defendant shall file a demurrer, and that if the court before which said cause is now pending shall overrule said demurrer and allow the relief prayed for in said amended bill of complaint, then said defendant shall proceed to appeal said cause in due course, and that the party, com-

plainants or defendant, against which said circuit court of appeals shall decide adversely, shall if said party so desires, in due course appeal said cause for final determination to the Supreme Court of the United States.

And it is further hereby agreed and stipulated that pending said appeal and all the procedure incident thereto, the decree and order of said courts, whether it be said circuit court of the United States for the district of Kansas, or said circuit court of appeals, or said Supreme Court of the United States, if adverse to said defendant allowing and decreeing the reliefs and remedies prayed for in said amended bill of complaint, shall be suspended and not enforced against said defendant The Missouri Pacific Railway Company, and when a decision has been rendered in said suit by said circuit court of appeals, or by the Supreme Court of the United States if the cause is taken to that court, then it is further hereby agreed and stipulated that the decision and judgment of either or both of said courts if adverse to said defendant The Missouri Pacific Railway Com-
63 pany, shall be vacated, set aside and annulled and shall not be regarded as of any force or effect against said defendant The Missouri Pacific Railway Comp-ny except so far as holding the amended bill to be sufficient, but that said The Missouri Pacific Railway Company shall have the right and shall be permitted to file an answer in said suit, to which said complainants The United States of America shall in due course file a replication thereto, and the issues shall be duly joined and the cause proceed to hearing and determination upon its merits in due course, the intention of this agreement being that the proceedings had upon the demurrer to said amended bill of complaint and the proposed appeal of said suit to a higher court shall in no manner prejudice the right of said defendant to a trial of said suit upon its merits.

Dated this 16 day of July, 1897.

W. C. PERRY,
MORRIS CLIGGITT,
Solicitors for Complainants.

Indorsed: No. 390. The U. S. A. *vs.* Mo. Pac. R'y Co. Stipulation. Filed Jul- 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

Affidavit.

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

W. C. Perry, of lawful age, being duly sworn, deposes as follows: I am United States attorney for the district of Kansas and solicitor

for the complainant. In support of the application for leave to file an amended bill of complaint in this suit, I testify that due notice has been given of said application to the defendant and the consent of the defendant obtained to the filing of an amended bill of complaint. The application for leave to file an amended bill of complaint is not made for the purpose of vexation or delay, and the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill.

W. C. PERRY.

Subscribed and sworn to before me this 18 day of July, 1897.
[SEAL.] GEO. F. SHARITT, *Clerk*,
By S. P. MOSHER, *Dep. Cl'k.*

64 Indorsed: 390. Affd. of W. C. Perry. Filed Jul- 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

UNITED STATES, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Order.

On the application of the complainant, the defendant consenting, said complainant is given permission to file its amended bill of complaint, and on the application of the defendant with consent of the complainant, said defendant is given leave to file a demurrer to said amended bill of complaint.

JNO. A. WILLIAMS, *Judge.*

Indorsed: No. 390. U. S. *vs.* Mo. Pac. R'y Co. Order permitting filing of amended bill and demurrer thereto. Filed Jul- 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Amended Bill of Complaint.

Come now the United States of America by W. C. Perry, United States attorney for the district of Kansas, and by leave of court first had and obtained, bring this their amended bill of complaint against The Missouri Pacific Railway Company, the defendant herein, and thereupon your orators complain and say:

That this suit is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is given under and in pursuance of a request of the Interstate Commerce Commission of the United States that the United States attorney for the district of Kansas be authorized

and directed to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate commerce law against the defendant in relation to the matters herein complained of.

And your orators further aver and show unto your honors that The Missouri Pacific Railway Company, defendant herein, is a corporation organized and existing under and by virtue of the
65 laws of the States of Missouri and Kansas, and that said defendant was at all times herein mentioned and now is a common carrier of all classes and kinds of freight and commodities which are commonly carried, moved and transported by railroad companies and common carriers, in the freight traffic of such companies or carriers, between the city of St. Louis, in the State of Missouri, and the city of Omaha in the State of Nebraska, and between the city of St. Louis in said State of Missouri and the city of Wichita in the State of Kansas, and between all points intermediate and beyond said cities on the line of defendant's railroad, and which said railroad and said points of shipment are situated in various States of the United States, and in said shipments of freight said defendant is subject to the terms and provisions of the act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, and to the amendments thereto.

And your orators further aver and show unto your honors that all shipments of freight between the city of St. Louis and the city of Wichita, and all shipments of freight between the city of St. Louis and the city of Omaha by said defendant company pass over the same track between the city of St. Louis and the city of Holden, in the State of Missouri, a distance of two hundred thirty-two (232) miles; that from said city of Holden said defendant has two lines of railroad, one of which from said city runs in a northwesterly direction to the city of Omaha, in the State of Nebraska, a distance over said defendant's railroad of five hundred one (501) miles from the city of St. Louis; and one branch of said railroad, from the said city of Holden runs in a westerly or southwesterly direction to the city of Wichita in the State of Kansas, a distance over defendant's railroad from said city of St. Louis of four hundred fifty-eight (458) miles. That said defendant owns, controls, manages and operates each and both of said lines of railroad in connection with many other lines of railroad owned, controlled and managed and operated by it and forming the Missouri Pacific system, and extending into and through different States of the United States, and that said defendant is constantly engaged as a common carrier of freight and passengers in the interstate commerce between the several States of the United States, and especially between the said city of St. Louis in the State of Missouri, and the city of Omaha, in the State of Nebraska, and the city of Wichita in the State of Kansas.

Your orators further aver and show unto your honors that the freight traffic between the city of St. Louis and the city of Wichita over said defendant's railroad is very extensive in volume
66 amounting to many thousands of dollars per annum, that said city of St. Louis is a general distributing point situated

on the Mississippi river and furnishes a market for large amounts of live stock and for freight of all classifications, and that the city of Wichita is a general distributing point for central and southern Kansas and the Indian Territory and Oklahoma, and furnishes an extensive market for freight of all classifications, and has extensive stock yards, and is largely engaged in the shipment of live stock, and but for the acts herein complained of would carry on a greatly increased and much larger and more profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight.

And your orators further aver that said defendant's line of railroad, between the said cities of St. Louis and Wichita, with its western and southern connections with other lines of railroad at the said city of Wichita, constitutes one of the principal thoroughfares for the freight traffic between the Mississippi river and the Pacific ocean, and between the Mississippi river and the gulf of Mexico, at the city of Galveston.

And your orators further aver and show unto your honors that said defendant has established and for a long time has maintained and still maintains in force on the line of its railroad between the city of St. Louis and the city of Wichita rates, rules and regulations governing all freight traffic between said cities over the said railroad which are unjust and unreasonable in this, that said charges for services rendered by said company in the transportation of property and freight of each and every classification between the said city of St. Louis and the city of Wichita is excessive, exorbitant, unreasonable and unjust to the extent and amount that such rates and charges exceed the rates and charges on the line of said defendant's railroad between the cities of St. Louis and Omaha, all of which is to the great detriment and hindrance of commerce and trade between the said cities of St. Louis and Wichita, and between the localities to which said cities contribute as a supply point, and to the irreparable injury of the public and to the people of the United States.

And your orators further aver and show unto your honors that said defendant has established and for a long time prior hereto has maintained in force, and still maintains in force upon its said railroad a tariff and schedule of freight rates, rules and regulations governing all freight traffic passing between the city of Omaha and the city of St. Louis, and on all freight traffic passing
67 between the city of Wichita and the city of St. Louis, by means of which said defendant charges, demands, collects and receives a greater compensation for the transportation of property and freight of each and every classification over its railroad between the city of Wichita and the city of St. Louis than it does for the transportation of property and freight of the same kind and like classification between the city of St. Louis and the city of Omaha, notwithstanding the fact that said shipments are made at the same time and contemporaneously, and under similar circumstances and conditions; and that the city of Omaha is a greater distance from the city of St. Louis than the city of Wichita.

And your orators further aver that the tariff rates, rules and regulations in force on its railroad, and the charges demanded and received for shipments of freight by defendant upon its railroad between the cities of Wichita and St. Louis are an unjust and unreasonable discrimination against said city of Wichita, and in favor of said city of Omaha, and against persons shipping freight and property between said city of Wichita and said city of St. Louis, and in favor of persons shipping freight between said city of Omaha and said city of St. Louis, and subject the locality in, about and tributary to Wichita and the persons living therein to an undue and unreasonable prejudice and disadvantage by reason of the fact that the charges made in pursuance of said tariff freight rates, rules and regulations are largely in excess of the charges made by said defendant for like and contemporaneous service for the transportation of property between the cities of Omaha and St. Louis, and under substantially similar circumstances and conditions, and that said rates, rules, regulations and charges collected and received by said defendant for the shipments of freight between the cities of Wichita and St. Louis are unreasonable, excessive, exorbitant and unjust.

And your orators further aver and show unto your honors that the tariff and schedule rates and freight charges for the shipment of cattle on foot between the city of Omaha and the city of St. Louis over defendant's line of railroad are 17½ cents per hundredweight; that the tariff and schedule rates and freight charges for the shipment of hogs on foot from the city of Omaha to the city of St. Louis over defendant's railroad are 20 cents per hundredweight; that the tariff and schedule rates and charges for the shipments of cattle on foot between the city of Wichita and the city of St. Louis over defendant's line of railroad are twenty-eight and three-fourths cents per hundredweight; and that the tariff and schedule rates and freight charges for shipments of hogs on foot between the city of Wichita and the city of St. Louis over defendant's line of railroad are thirty-five cents per hundredweight.

68 That the tariff and schedule rate and charge for the shipment of the various classifications of freight between the city of Omaha and the city of St. Louis over defendant's railroad is as follows, to wit:

First-class freight 55 cents per cwt.
Second-class freight 40 cents per cwt.
Third-class freight 32 cents per cwt.
Fourth-class freight 25 cents per cwt.
Fifth-class freight 20 cents per cwt.
Class A 22½ cents per cwt.
Class B 17½ cents per cwt.
Class C 15 cents per cwt.
Class D 12½ cents per cwt.
Class E 11 cents per cwt.

That the tariff and schedule rate and charge for shipment of the various classifications of freight between the city of Wichita and the city of St. Louis over defendant's line of railroad is as follows, to wit:

First-class freight 115 cents per cwt.
Second-class freight 93 cents per cwt.
Third-class freight 78 cents per cwt.
Fourth-class freight 62½ cents per cwt.
Fifth-class freight 53 cents per cwt.
Class A 52 cents per cwt.
Class B 39½ cents per cwt.
Class C 33 cents per cwt.
Class D 27 cents per cwt.
Class E 11 cents per cwt.

That said tariff and schedule rates and charges above set forth constitute an unjust and unreasonable discrimination against persons shipping freight between the city of Wichita and the city of St. Louis and subject such persons and localities from which they ship to an unjust and unreasonable prejudice and disadvantage to the great hindrance and detriment of trade and commerce between St. Louis and the city of Wichita, and the localities tributary thereto, and to the irreparable injury to the persons shipping from said points and to the people of the United States.

And your orators further aver and show unto your honors that any schedule rates and freight charges for the various shipments and classifications hereinbefore set forth between the said cities of St. Louis and Wichita that are in excess of the tariff schedules and freight charges for shipments of the like kind and class of property between the cities of St. Louis and Omaha are unreasonable,
69 excessive, exorbitant and unjust in and of themselves, and constitute an unreasonable discrimination against Wichita and the localities tributary thereto and the people living therein and against persons shipping freight between the cities of Wichita and St. Louis and subject such persons and localities to an unjust and unreasonable prejudice and disadvantage.

In consideration whereof, and inasmuch as the wrongs herein complained of are remediless in the premises under the ordinary forms and proceedings at law and are relievable only in a court of equity and in this form of procedure, you- orators pray that the defendant, The Missouri Pacific Railway Company, its officers agents and employés, may provisionally and perpetually be enjoined and restrained by order of injunction issued herein from further establishing and maintaining in force upon its road freight rates, rules and regulations and charges governing the freight traffic between the city of Wichita and the city of St. Louis, by means whereof said defendant, its officers, agents and employés are required to and do collect a greater compensation for the shipment of live stock and for the shipment of the various classifications of freight mentioned in the foregoing amended bill of complaint between the city of Wichita and the city of St. Louis than it at the same time charges and receives for shipments of live stock or freight of the same classification as set forth in the above and foregoing amended bill of complaint between the cities of Omaha and St. Louis, and that said defendant, its officers, agents and employés be restrained and enjoined from continuing to charge unreasonable, exorbitant and unjust freights and tariffs

for the shipment of property and freight over its line between the cities of Wichita and St. Louis, and that it be enjoined and restrained from continuing or putting in force upon its line of railroad a greater rate of freight charge for transportation of freight of like classification between the city of Wichita and the city of St. Louis than it puts in force and maintains between the city of St. Louis and the city of Omaha.

To the end therefore that said defendant may, if it can, show why your orators should not have the relief hereby prayed, and may according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to each and all of the matters and things in this amended bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph and it was specially interrogated thereunto, may it please your honors to grant unto your orators a writ of *subpœna ad respondendum* issuing out of and under the seal of this honorable court, to be directed to said defend-
70 ant, The Missouri Pacific Railway Company, commanding it on a certain day and under certain penalty to be there inserted to appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the said premises (answer under oath being hereby expressly waived), and further to stand to, perform and abide by such further order or decree as to your honors shall seem just and meet.

And also may it please your honors to grant unto your orators a writ of provisional and a writ of perpetual injunction to the same tenor, purport and effect as hereinbefore set forth and prayed, and also that in the meantime said defendant may be temporarily restrained and enjoined by an order of injunction or rule issuing out of and under the seal of this honorable court from doing any of the things against which an injunction is hereby prayed; and that your orators may have such other and further relief in the premises as the nature of the case may require and to your honors shall seem meet.

And your orators will ever pray, etc.

THE UNITED STATES OF AMERICA,
By W. C. PERRY,
United States Attorney for the District of Kansas and Solicitor for Complainants.

MORRIS CLIGGITT, *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

W. C. Perry being first duly sworn on oath says that he is the United States attorney for the district of Kansas, that he has read the foregoing amended bill of complaint and knows the contents thereof, and that the averments and allegations therein contained are true as he verily believes.

W. C. PERRY.

Subscribed and sworn to before me this — day of May, 1897.

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Indorsed: 390. The United States of America compl'ts *vs.* The Missouri Pacific Railway Company, defendant. Amended bill of complaint. Filed July 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

71 In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

The demurrer of the above-named defendant, The Missouri Pacific Railway Company, to the amended bill of complaint of the above-named complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said amended bill, and for causes of demurrer showeth:

I. That it appeareth by the complainants' own showing by the said amended bill, that they are not entitled to the relief prayed by the amended bill against this defendant.

II. That the said amended bill is exhibited against this defendant for several and distinct and independent matters and causes which have no relation to each other, and in which, or in the greater part of which this defendant is in no way interested or concerned, and ought not to be implicated.

III. That this defendant is not answerable to said complainants, but to some other persons, whose names it cannot state.

IV. That the said amended bill does not embrace the whole matter concerning which the suit is brought; wherefore this defendant may be harassed with other suits and a multiplicity of suits may ensue.

V. That it appears by the said amended bill that there are divers other persons who are necessary parties to the said bill but who are not made parties thereto.

VI. That it appears by the said amended bill that the case of the said complainants is barred by the statute of limitations.

Wherefore, and for divers other good causes of demurrer appearing on the said amended bill, this defendant doth demur thereto. And it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said amended bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

J. H. RICHARDS,
C. E. BENTON,
RALPH RICHARDS,
B. P. WAGGENER,
Solicitors for Defendant, The Missouri Pacific Railway Company.

72 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

J. H. RICHARDS,
Solicitor for Defendant, The Missouri Pacific Railway Company.

STATE OF KANSAS, *County of Bourbon,* } ss:

J. H. Richards, being duly sworn, deposes and says: I am one of the solicitors of the above-named defendant. The foregoing demurrer is not interposed for delay.

J. H. RICHARDS.

Subscribed and sworn to before me this 5th day of July, A. D. 1897.

My commission expires Aug. 6, 1899.

[SEAL.]

GEO. O. BACON,
Notary Public, Bourbon County, Kansas.

Indorsed: 390. The United States of America, complainant, vs. The Missouri Pacific Railway Company. Demurrer of defendant to amended bill of complaint. Filed Jul- 19, 1897. Geo. F. Shariff, clerk. By J. F. Shearman, D. C.

UNITED STATES, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

Order.

This cause came on to be further heard at this term on the demurrer of the defendant to the amended bill of complaint, and was argued by counsel, and thereupon on consideration thereof it is ordered, adjudged and decreed that said demurrer be and the same hereby is overruled, to which the defendant excepted and excepts, and which exception is allowed by the court. And thereupon the defendant electing to stand on its demurrer, it is hereby ordered, adjudged and decreed that the Missouri Pacific Railway Company, its officers, agents and employees be, and they hereby are, perpetually enjoined and restrained from further establishing and maintaining in force upon its road freight rates, rules and regulations and charges governing the freight traffic between the city of Wichita and the city of St. Louis, by means whereof said defendant, its officers, agents, and employees, are required to and do collect a greater compensation for the shipment of live stock, and for the shipment of any of the various classifications of freight mentioned in the amended bill of complaint, between the city of Wichita and the city of St. Louis, than it at the same time charges and receives for shipments of live stock and for freight of the same classification as set forth in said
73 amended bill of complaint between the city of Omaha and the city of St. Louis, when any of said shipments are made under substantially similar circumstances and conditions.

And said defendant, its officers, agents and employees, hereby are perpetually restrained and enjoined from continuing to charge unreasonable, exorbitant and unjust rates and tariffs for the shipment of property and freight over its line between the city of Wichita and the city of St. Louis, and from continuing or putting in force upon said line of railway greater rates of freight charges for the transportation of freight of like classification between the city of Wichita and the city of St. Louis than it puts in force and maintains between the city of St. Louis and the city of Omaha, when said transportation is conducted under substantially similar conditions and circumstances.

It is also ordered adjudged and decreed that the complainant have and recover from the defendant its costs in this behalf expended. And to the rendition of this decreee and the injunctions therein contained, the defendant at the time excepted, which exception was and is allowed.

JNO. A. WILLIAMS, *Judge.*

Indorsed: No. 390. The United States of America *vs.* The Missouri Pacific Railway Co. Order. Filed Jul- 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainants, *vs.* THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity. No. 390.

Assignment of Errors.

Now on this 23d day of December A. D. 1897, comes The Missouri Pacific Railway Company, defendant in the above-entitled action, by B. P. Waggener, J. H. Richards and C. E. Benton, its solicitors, and says that the order and decree made and entered in the above-entitled action in the above-named court on the 19th day of July, 1897, are erroneous and against the just rights of said defendant for the following reasons, to wit:

First. The court erred in overruling the demurrer to the amended bill of complaint and in entering the said decree, because it appears by said amended bill of complaint that the complainants are not entitled to the relief prayed for therein or to any relief.

74 Second. The court erred in entertaining said suit and in rendering said order and decree, because the complainants, The United States of America, are not the parties in interest and have no right, power or authority to prosecute said suit.

Third. The court erred in entertaining this suit and in rendering said order and decree, because the said complainants are not the parties in interest, there being no property rights of said complainants involved in this suit.

Fourth. The court erred in entertaining this suit and in rendering said order and decree, because the complainants, The United States of America, have no right, power or authority under the act to regulate interstate commerce on which the said amended bill of complaint is founded, to prosecute this action, before the powers of the Interstate Commerce Commission under said act have been exercised and exhausted.

Fifth. The court erred in entertaining this suit and in rendering the said order and decree, because if any person or persons sustained damage by the act or acts of this defendant in fixing and collecting rates between the city of Wichita and the city of Saint Louis such person or persons have adequate remedies under the provisions of section- eight, nine, ten and sixteen of the said act to regulate commerce.

Sixth. The court erred in entertaining this suit and rendering said order and decree because by the provisions of the act to regulate interstate commerce the Interstate Commerce Commission had and has exclusive primary jurisdiction to investigate and determine the matters charged in said amended bill of complaint, and at no time was any complaint made to or filed with said commission, or any proceedings or hearing had before said commission, relating to the matters set forth in said amended bill of complaint, nor did said commission ever make any order with reference to the same.

Seventh. The court erred in rendering said decree against this defendant in so far as the said decree prohibits this defendant, its officers, agents (*agents*) and employés, from charging and collecting greater compensation for the shipment of live stock and for the shipment of the various classifications of freight mentioned in said amended bill of complaint between the city of Wichita and the city of St. Louis than (—) at the same time charges and receives for the shipment of live stock and for said freight between the city of Omaha and the city of Saint Louis, because the court has no power to prescribe what rate shall be charged in the future between the city of Wichita and the city of Saint Louis.

75 Eighth. The court erred in rendering said decree in so far as this defendant, its officers, agents and employés, are perpetually restrained and enjoined from continuing to charge unreasonable, exorbitant and unjust rates and tariffs for the shipment of property and freight over its lines between the city of Wichita and the city of Saint Louis, because the court assumed, without proof or sufficient allegation, that this defendant had been charging unjust and exorbitant rates between said points, and assumed that all rates and charges on freight of the classifications mentioned in said amended bill of complaint were exorbitant and unreasonable to the extent and amount that such rates and charges exceeded the rate and charges on defendant's line of railroad on said freight, between the city of Omaha and the city of Saint Louis.

Ninth. The court erred in rendering said decree in this, in assuming, without proof or sufficient allegation in said amended bill of complaint, that the transportation of live stock and of the various

classifications of freight mentioned in said bill were or could be made over defendant's line of railroad between the city of Wichita and the city of Saint Louis under substantially similar circumstances and conditions as govern the transportation of like shipments between the city of Omaha and the city of Saint Louis.

Tenth. The court erred in rendering said decree against this defendant, for the reason that the amended bill of complaint is insufficient in failing to show that there is such actual and real competition or competitive interests between the cities of Wichita and Omaha and the city of Saint Louis, as to necessarily render any alleged discriminations or preference or prejudice unjust, (*indue*) and unlawful, within the purview and provisions of the interstate-commerce act.

Wherefore said defendant prays that the said order and decree of said court may be reversed and set aside and that this defendant be restored to all rights which its has lost by reason of the rendition of the same, and that said circuit court of the United States for the second division of the district of Kansas be directed to enter a decree sustaining defendant's demurrer to the said amended bill of complaint, and for such other and further relief as to the court may seem just.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON, *Its Solicitors.*

Indorsed: 390. Assignment of errors. Filed Dec. 23, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

76 In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainants,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.
} No. 390. In Equity.

Know all men by these presents, that we, The Missouri Pacific Railway Company as principal, and C. F. Drake and Chas. Nelson as sureties, are held and firmly bound unto the above-named United States of America in the sum of five hundred dollars to be paid to the said United States of America, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 23rd day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, the above-named The Missouri Pacific Railway Company has prosecuted an appeal to the United States circuit court of

appeals for the eighth circuit to reverse a decree rendered in the above-entitled suit in the circuit court of the United States for the second division of the judicial district of Kansas;

Now therefore, the condition of this obligation is such that if the above-named The Missouri Pacific Railway Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE MISSOURI PACIFIC RAILWAY COMPANY, [SEAL.]
By C. E. BENTON, *Its Solicitor.*
C. F. DRAKE. [SEAL.]
CHAS. F. NELSON. [SEAL.]

Sealed and delivered in the presence of
GEO. A. BACON.

Approved this 23d day of December 1897.
CASSIUS G. FOSTER, *Judge.*

Indorsed: 390. Bond. Filed Dec. 23, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

77 In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.
} No. 390. In Equity.

Petition on Appeal.

The above-named defendant conceiving itself aggrieved by the order and decree made and entered on the 19th day of July 1897 in the above-entitled cause does hereby appeal from said order and decree to the United States circuit court of appeals for the eighth circuit, for the reasons specified in the assignment of errors which is filed herewith, and defendant prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON,
Solicitors for Defendant.

December 22d, 1897.

Now to wit, on this 23rd day of December, 1897, it is ordered that the appeal be allowed as prayed for.

CASSIUS G. FOSTER, *Judge.*

Indorsed: 390. Petition for and order allowing appeal. Filed Dec. 23, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

UNITED STATES OF AMERICA, } ss:
District of Kansas, Second Division, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the above and foregoing to be true, full and correct copies of the several files and records in the case therein entitled, as the same appear on file or of record in my office in said division.

Seal of the Circuit Court of the United States, 2d Div., District of Kansas.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Wichita, in said district this 4th day of January, A. D. 1898.

GEO. F. SHARITT, *Clerk*,
By J. F. SHEARMAN,
Deputy Clerk.

Filed Jan. 12, 1898.

JOHN D. JORDAN, *Clerk.*

78 (*Appearance for Appellant.*)

And on the twelfth day of January, A. D. 1898, an appearance of counsel for the appellant was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant, }
vs. } No. 1040.
THE UNITED STATES OF AMERICA. }

The clerk will enter my appearance as counsel for the appellant.

ALEX. G. COCHRAN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. December term, 1897. No. 1040. Missouri Pacific R'y Co., appellant, *vs.* The United States. Appearance. Filed Jan. 12, 1898. John D. Jordan, clerk. Alex. G. Cochran, counsel for appellant.

(*Appearance for Appellant.*)

And on the fourteenth day of October, A. D. 1899, an appearance of counsel for the appellant was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
UNITED STATES OF AMERICA. } No. 1040.

The clerk will enter our appearance as counsel for the appellant.

C. E. BENTON.
RALPH RICHARDS.
J. H. RICHARDS.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1899. No. 1040. Missouri Pacific Railway Company, appellant, *vs.* United States of America. Appearance. Filed Oct. 14, 1899. John D. Jordan, clerk. C. E. Benton, Ralph Richards and J. H. Richards, Fort Scott, Kan., counsel for appellant.

79

(*Appearance for Appellee.*)

And on the eighth day of March, A. D. 1898, an appearance of counsel for the appellee was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

MISSOURI PACIFIC RAILWAY CO., Appellant,
vs.
UNITED STATES OF AMERICA. } No. 1040.

The clerk will enter my appearance as counsel for the appellee.

I. E. LAMBERT,
U. S. Attorney.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. December term, 1897. No. 1040. Missouri Pacific Railway Co., appellant, *vs.* United States. Appearance. Filed Mar. 8, 1898. John D. Jordan, clerk. I. E. Lambert, counsel for appellee.

(*Appearance for Appellee.*)

And on the fourteenth day of March, A. D. 1899, an appearance of counsel for the appellee was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
UNITED STATES. } No. 1040.

The clerk will enter my appearance as counsel for the appellee.
W. C. PERRY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit.
80 December term, 1898. No. 1040. Missouri Pacific Railway Company, appellant, *vs.* United States. Appearance. Filed Mar. 14, 1899. John D. Jordan, clerk. W. C. Perry, counsel for appellee.

(*Order of Submission.*)

And on the twenty-third day of May, A. D. 1900, in the record of the proceedings of said United States circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

WEDNESDAY, *May* 23, 1900.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
THE UNITED STATES OF AMERICA. } No. 1040.

Appeal from the circuit court of the United States for the district of Kansas.

This cause having been called for hearing in its regular order, was argued by Mr. J. H. Richards for appellant and submitted by appellee without oral argument.

Thereupon, this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Decree.*)

And on the twenty-third day of May, A. D. 1900, in the record of the proceedings of said United States circuit court of appeals is a decree in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

WEDNESDAY, *May* 23, 1900.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
THE UNITED STATES OF AMERICA. } No. 1040.

Appeal from the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas, and was argued by counsel.

81 On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause, be, and the same is hereby, affirmed without costs to either party in this court and without an opinion.

May 23, 1900.

(*Assignment of Errors.*)

And on the fourteenth day of May, A. D. 1901, an assignment of errors was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

Assignment of Errors.

Now on this 10th day of May, 1901, comes The Missouri Pacific Railway Company, defendant in the above-entitled action by J. H. Richards and C. E. Benton, its solicitors, and says that the order and decree made and entered in the above-entitled action in the above-named court on the 23rd day of May, 1900, are erroneous and against the just rights of said defendant for the following reasons, to wit:

First. The court erred in overruling the demurrer to the amended bill of complaint and in entering said decree, because it appears by said amended bill of complaint that the court had no jurisdiction to entertain said suit, said bill is without equity, and shows upon its face that the complainants are not entitled to the relief prayed for therein, or to any relief.

Second. The court erred in entertaining this suit and in rendering said order and decree because the complainants, The United States of America, are not the real parties in interest and have no lawful right, power or authority to prosecute said suit, and no property rights of said complainants are involved in said suit.

82 Third. The court erred in entertaining this suit and in rendering said order and decree because the complainants, The United States of America, have no right, power or authority under the Constitution and laws of the United States and the act to regulate interstate commerce on which said amended bill of complaint is alleged to be founded, to prosecute this suit before a hearing of the matters in dispute between the complainants and the defendant has been had by the Interstate Commerce Commission and said Interstate Commerce Commission has acted upon the same as provided by law.

Fourth. The court erred in entertaining this suit and in rendering said order and decree, because if any person or persons, locality or municipality sustained damage by the act or acts of this defendant in fixing and collecting rates between the city of Wichita and the city of St. Louis, or between the city of Omaha and the city of St. Louis, such person or persons, locality or municipality have adequate remedies, and in cases of injunctions exclusive remedy, under the provisions of said act to regulate interstate commerce.

Fifth. The court erred in entertaining this suit and rendering said order and decree because by the provisions of the act to regulate interstate commerce the Interstate Commerce Commission had and has exclusive primary jurisdiction to investigate and determine the matters charged in said amended bill of complaint, and at no time was any complaint made to or filed with said commission, or any proceedings or hearing had before said commission, relating to the matters set forth in said amended bill of complaint, nor did said commission ever make any order with reference to the same.

Sixth. The court erred in rendering said decree against this defendant in so far as the said decree prohibits this defendant, its officers, agents and employees, from charging and collecting greater compensation for the shipment of live stock and of the various classifications of freight mentioned in said amended bill between the city of Wichita and the city of St. Louis, than it at the same time charges and receives for the shipment of live stock and of freight between the city of Omaha and the city of St. Louis,
83 because neither the Interstate Commerce Commission nor the court had power or right to prescribe what rate should be charged in the future, or at all, between the city of Wichita and the city of St. Louis, and because the court in rendering said decree assumed, without proof or sufficient allegation that the defendant had been charging unjust and exorbitant rates between said points, and assumed that all rates and charges on freight of the classifications mentioned in said amended bill were exorbitant and unreasonable to the extent and amount that such rates and charges exceeded the rate and charges on defendant's line of railroad between the city of Omaha and the city of St. Louis.

Seventh. The court erred in rendering said decree against this defendant for the reason that the amended bill of complaint is insufficient in failing to show that there is such actual and real competition or competitive interests between the cities of Wichita and Omaha and the city of St. Louis as to render the alleged charges

discriminations, preferences or prejudices unjust and unlawful within the purview and provisions of the interstate-commerce act.

Eighth. The court erred in rendering said decree against this defendant for the reason that the amended bill of complaint does not state facts sufficient to constitute a cause of action or suit in favor of the complainants and against the defendant.

Wherefore defendant prays that the said order and decree of said court may be reversed and set aside and that this defendant be restored to all rights which it has lost by reason of the rendition of the same, and that said United States circuit court of appeals be directed to enter a decree sustaining defendant's demurrer to the said amended bill of complaint, and for such other and further relief as to the court may seem just.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By J. H. RICHARDS,
C. E. BENTON, *Its Solicitors.*

B. P. WAGGENER, *Of Counsel.*

84 (Endorsed:) No. 1040. U. S. circuit court of appeals, eighth circuit. Missouri Pacific R'y Co., appellant, *vs.* United States of America. Assignment of errors. Filed May 14, 1901. John D. Jordan, clerk.

(*Affidavit as to Amount in Controversy.*)

And on the fourteenth day of May, A. D. 1901, an affidavit as to amount in controversy was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

Affidavit.

UNITED STATES OF AMERICA,
State of Kansas, Bourbon County, } *ss:*

J. H. Richards being duly sworn on oath says that he is one of the solicitors for The Missouri Pacific Railway Company, defendant in the above-entitled action; that he has personal knowledge of the amount in controversy herein and which said amount is more than five thousand (5,000) dollars exclusive of costs.

J. H. RICHARDS.

Subscribed and sworn to before me this 11th day of May, 1901.

GEO. O. BACON,
[SEAL.] *Notary Public, Bourbon County, Kansas.*

My commission expires Aug. 6th, 1903.

(Endorsed:) No. 1040. U. S. circuit court of appeals, eighth circuit. Missouri Pacific R'y Co., appellant, *vs.* United States of America. Affidavit as to amount in controversy. Filed May 14, 1901. John D. Jordan, clerk.

85 (*Petition for and Order Allowing Appeal.*)

And on the fourteenth day of May, A. D. 1901, a petition for and order allowing an appeal was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

Petition on Appeal.

The above-named defendant, appellant, The Missouri Pacific Railway Company, conceiving itself aggrieved by the order and decree made and entered on the 23rd day of May, 1900, in the above cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States for review.

C. E. BENTON,
J. H. RICHARDS,
Solicitors for Defendant.

B. P. WAGGENER, *Of Counsel.*

May 13th, 1901.

Now, to wit: on this 14th day of May, 1901, it is ordered that the appeal be allowed as prayed for.

WALTER H. SANBORN,
U. S. Circuit Judge in and for the Eighth Circuit.

(Endorsed:) No. 1040. U. S. circuit court of appeals, eighth circuit. Missouri Pacific R'y Co., appellant, *vs.* United States of America. Petition for and order allowing an appeal. Filed May 14, 1901. John D. Jordan, clerk.

86 (*Appeal Bond.*)

And on the fourteenth day of May, A. D. 1901, an appeal bond was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

Bond.

Know all men by these presents, that we, The Missouri Pacific Railway Company as principal, and Chas. Nelson & C. F. Drake as sureties, are held and firmly bound unto the above-named United States of America in the sum of five thousand dollars *dollars* to be paid to the said United States of America, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 10th day of May, in the year of our Lord one thousand nine hundred and one.

Whereas, the above-named The Missouri Pacific Railway Company has prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered in the above-entitled suit in the United States circuit court of appeals, eighth circuit;

Now therefore, the condition of this obligation is such that if the above-named The Missouri Pacific Railway Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE MISSOURI PACIFIC RAILWAY COMPANY, [SEAL.]
By J. H. RICHARDS, *Its Solicitor.*
CHAS. NELSON. [SEAL.]
C. F. DRAKE. [SEAL.]

Sealed and delivered in the presence of:
J. H. RICHARDS.

87 (Endorsed:) No. 1040. U. S. circuit court of appeals, eighth circuit. Missouri Pacific R'y Co., appellant, *vs.* United States of America. Appeal bond. The within bond and the security furnished thereby are approved this May 14, 1901. Walter H. Sanborn, U. S. circuit judge. Filed May 14, 1901. John D. Jordan, clerk.

(*Citation.*)

And on the fourteenth day of May, A. D. 1901, a citation was filed in the clerk's office of said United States circuit court of appeals, in said cause, the original of which is hereto attached and herewith returned.

88 *Citation.*

In the Supreme Court of the United States.

The United States of America to the United States of America:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty (30) days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the United States court of appeals, eighth circuit, wherein The Missouri Pacific Railway Company is appellant and The United States of America is appellee, to show cause, if any there be, why the order and decree rendered against the said appellant in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter H. Sanborn, U. S. circuit judge, this 14th day of May, in the year of our Lord one thousand nine hundred and one.

WALTER H. SANBORN,
United States Circuit Judge in and for the Eighth Circuit.

89 [Endorsed:] No. —. Supreme Court of the United States. October term, 190–. The Missouri Pacific Railway Company, appellant *vs.* The United States of America. Citation. Filed May 14 1901 John D. Jordan, clerk. Citation.

In the Supreme Court of the United States.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
THE UNITED STATES OF AMERICA, Appellee. } In Equity.

Waiver of Issuance and Service of Citation and Entry of Appearance.

We hereby, this 10th day of May, 1901, waive the issuance and service of *service of* citation in the above-entitled cause on behalf of The United States of America, appellee, and agree to enter the appearance of the United States of America in the said cause in the Supreme Court of the United States.

I. E. LAMBERT,
United States Attorney for the District of Kansas.
W. C. PERRY,
Solicitor for Appellee.

[Endorsed:] No. 1040. Supreme Court of the United States. October term, 190–. Missouri Pacific Railway Company, appellant, *vs.* The United States of America. Waiver of issuance and service of citation and appearance for appellee. To be filed by clerk Supreme Court U. S.

90 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing ninety pages contain full, true and complete copies of all the pleadings, proceedings and record entries, in a certain cause wherein The Missouri Pacific Railway Company was appellant, and The United States of America was appellee, No. 1040, May term, 1900, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the mandate in said cause was issued to the circuit court of the United States for the district of Kansas on the twenty-third day of July, A. D. 1900.

I do further certify that the original citation is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this sixteenth day of May, A. D. 1901.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: File No. 18,181. U. S. circuit court appeals, 8th circuit. Term No. 108. The Missouri Pacific Railway Company, appellant, *vs.* The United States. Filed May 25, 1901.